DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-1450
Title: The Standard Fire Insurance Company, Petitioner
v.
Greg Knowles
Docketed: June 1, 2012
Lower Ct: United States Court of Appeals for the Eighth Circuit
Case Nos.: (11-8030)
Decision Date: January 4, 2012
Rehearing Denied: March 1, 2012
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
May 30 2012	Petition for a writ of certiorari filed. (Response due July 2, 2012)
Jun 29 2012	Brief amicus curiae of Center for Class Action Fairness filed.
Jul 2 2012	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
Jul 2 2012	Brief of respondent Greg Knowles in opposition filed.
Jul 16 2012	Reply of petitioner The Standard Fire Insurance Company filed.
Jul 18 2012	DISTRIBUTED for Conference of September 24, 2012.
Aug 31 2012	Petition GRANTED.
Sep 26 2012	The time to file the joint appendix and petitioner's brief on the merits is extended to and including October 22, 2012.
Sep 26 2012	The time to file respondent's brief on the merits is extended to and including November 28, 2012.
Oct 19 2012	Consent to the filing of amicus curiae briefs, in support of either party of neither party, received from counsel for the respondent.
Oct 22 2012	Joint appendix filed. (Statement of costs received)
Oct 22 2012	Brief of petitioner The Standard Fire Insurance Company filed.
Oct 23 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Oct 26 2012	Brief amici curiae of Professors E. Donald Elliott and John J. Watkins filed.
Oct 28 2012	Brief amicus curiae of Arkansas State Chamber of Commerce filed.
Oct 29 2012	Brief amicus curiae of National Association of Manufacturers filed.
Oct 29 2012	Brief amici curiae of Washington Legal Foundation, et al. filed.
Oct 29 2012	Brief amici curiae of 21st Century Casualty Company, et al. filed.
Oct 29 2012	Brief amicus curiae of Chamber of Commerce of the United States of America, et al. filed.

Oct 29 2012	Brief amicus curiae of Cato Institute filed.
Oct 29 2012	Brief amici curiae of Alabama, et al. filed.
Oct 29 2012	Brief amicus curiae of Defense Research Institute filed.
Oct 29 2012	Brief amicus curiae of Hartford Underwriters Insurance Company filed.
Oct 29 2012	Brief amici curiae of Manufactured Housing Institute, et al. filed.
Oct 29 2012	Brief amicus curiae of Partnership for America filed.
Oct 29 2012	Brief amicus curiae of Center for Class Action Fairness filed.
Oct 31 2012	SET FOR ARGUMENT ON Monday, January 7, 2013.
Nov 16 2012	CIRCULATED.
Nov 20 2012	Record received from U.S.C.A. for Eight Circuit. (1 envelope)
Nov 28 2012	Brief of respondent Greg Knowles filed. (Distributed)
Dec 4 2012	Brief amicus curiae of Arkansas Trial Lawyers Association filed. (Distributed)
Dec 5 2012	Brief amici curiae of Arkansas, et al. filed. (Distributed)
Dec 5 2012	Brief amici curiae of Public Citizen, Inc., et al. filed. (Distributed)
Dec 19 2012	Reply of petitioner The Standard Fire Insurance Company filed. (Distributed)
Jan 7 2013	Argued. For petitioner: Theodore J. Boutrous, Jr., Los Angeles, Cal. For respondent: David C. Frederick, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

FILED
MAY 30 2012
OFFICE OF THE CLERK

No. 11-1450

In The
Supreme Court of the United States

THE STANDARD FIRE INSURANCE COMPANY,

Petitioner,

v.

GREG KNOWLES, Individually and as Class Representative on Behalf of all Similarly Situated Persons Within the State of Arkansas,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Last Term, this Court held that in a putative class action "the mere proposal of a class . . . could not bind persons who were not parties." *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2382 (2011). In light of that holding, the question presented is:

When a named plaintiff attempts to defeat a defendant's right of removal under the Class Action Fairness Act of 2005 by filing with a class action complaint a "stipulation" that attempts to limit the damages he "seeks" for the absent putative class members to less than the $5 million threshold for federal jurisdiction, and the defendant establishes that the actual amount in controversy, absent the "stipulation," exceeds $5 million, is the "stipulation" binding on absent class members so as to destroy federal jurisdiction?

CORPORATE DISCLOSURE STATEMENT

Defendant-Petitioner The Standard Fire Insurance Company is an indirect, wholly-owned subsidiary of The Travelers Companies, Inc., a publicly-traded company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner The Standard Fire Insurance Company ("Standard Fire") respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit in *Greg Knowles v. The Standard Fire Insurance Company*, No. 11-8030.

OPINIONS BELOW

The district court's opinion granting remand is at 2011 WL 6013024; *see also* App. 2. The Eighth Circuit judgment denying permission to appeal is at App. 1. The Eighth Circuit order denying rehearing *en banc* and panel rehearing is at App. 16.

JURISDICTION

The Eighth Circuit judgment denying permission to appeal was entered on January 4, 2012. App. 1. The Eighth Circuit denied rehearing *en banc* and by the panel on March 1, 2012. App. 16. This petition for certiorari is timely filed within 90 days of denial of rehearing *en banc*. S. Ct. R. 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1). *See also Hohn v. United States*, 524 U.S. 236, 242 (1998) (Supreme Court may grant *certiorari* after court of appeals denies permission to appeal).

RELEVANT STATUTORY PROVISION

The Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d), provides, in pertinent part:

(d)(1) In this subsection –

(A) the term "class" means all of the class members in a class action;

(B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

(C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

(D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which –

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

. . .

> (6) In any class action, the claims of the individual class members shall be aggregated to determine whether the amount in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.
>
> . . .
>
> (8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

STATEMENT OF THE CASE

This petition presents an issue vital to the efficacy of the Class Action Fairness Act of 2005 ("CAFA") and the future of class action litigation. CAFA provides defendants with the right to remove putative class actions to federal court in all cases seeking class treatment that are: (i) filed in a state other than the defendant's state of incorporation or principal place of business; and (ii) have an amount in controversy over $5 million. *See* 28 U.S.C. § 1332(d). In cases in which the amount in controversy, based on the claims alleged, exceeds $5 million, some class action plaintiffs' lawyers have sought to destroy federal jurisdiction under CAFA by having the named plaintiff sign a "stipulation" that purports to be "binding" on the members of the putative class and purports to limit to under $5 million, in the aggregate, the damages the named plaintiff "seeks" on behalf of all members of the putative class he or she hopes to, but does not yet,

have authority to represent. The Eighth Circuit has allowed such a "stipulation" to defeat federal jurisdiction even though the district court concluded that the defendant had established an amount in controversy, absent the "stipulation," that met the $5 million threshold.

The Eighth Circuit erred in upholding this tactic. The Constitution, CAFA, and basic principles of class action law do not allow a plaintiff to represent absent putative class members without any court authorization. They do not allow a plaintiff to impose a binding limitation on the amount potentially recoverable by those persons for the purpose of depriving a defendant of its right to removal under CAFA. Such a purported "stipulation" by an unauthorized representative of an uncertified class is a legal nullity that must be disregarded by federal courts in determining the jurisdictional amount in controversy. Disregarding these "stipulations," which are indisputably contrived for the sole purpose of evading federal jurisdiction under CAFA, not only protects defendants' right of removal and absent class members' constitutional rights, but also ensures that CAFA will achieve its expressed purpose of protecting against state-court abuses of the class action device. *See* Pub. L. No. 109-2, § 2.

A. Background of Pre-CAFA Class Actions in Miller County, Arkansas

Prior to CAFA, the same attorneys who represent Plaintiff filed many class actions in the Circuit Court

of Miller County, Arkansas, against corporate defendants, including numerous cases against insurance companies (some of them alleging the same theory asserted here). In these cases, Plaintiff's counsel obtained orders from the state court deferring briefing on all dispositive motions until after discovery was complete and class certification was decided. The Circuit Court of Miller County then allowed Plaintiff's counsel, over vigorous objection from defendants, to pursue discovery that was incredibly expensive and burdensome. Compliance with this staggeringly expensive discovery was ordered prior to briefing on certification in order to force massive nationwide settlements in cases in which the federal courts would have never certified a class. *See, e.g.*, Michelle Massey, "'Failure to communicate' could lead to $45 M in discovery costs," *Southeast Texas Record*, Aug. 8, 2007 (describing how Miller County court "ordered defendant Foremost Insurance Company to produce all of its claim files, even though the defendants estimated the cost for production at $45 million.").

These forced settlements resulted in attorneys' fees awards to Plaintiff's counsel of hundreds of millions of dollars. *See* "The colossal Colossus travesty," *Southeast Texas Record*, Mar. 28, 2009; *see also* App. 46. In some of these settlements, no one received any money except for Plaintiff's lawyers. *See* "Judge OKs $90M 'click fraud' settlement," *Associated Press Financial Wire*, July 29, 2006 ("No one will receive cash except the lawyers, who will split $30 million."). These are precisely the types of abuses of the class action

device that Congress sought to eliminate when it enacted CAFA. *See* Pub. L. No. 109-2, § 2(a)(4) (finding that "Abuses in class actions undermine the National judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States constitution. . . .").

B. The Stipulation Device Used to Evade CAFA

CAFA was intended to bring the types of class actions that Plaintiff's attorneys had filed in Arkansas state court before CAFA into federal court if such suits were filed after CAFA's effective date. Congress enacted CAFA to "enable[ ] defendants to remove to federal court any sizable class action involving minimal diversity of citizenship." *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2382 (2011). CAFA provides that, when a named plaintiff files a putative class action in a state court against a defendant that is not a citizen of the state where suit is filed, federal jurisdiction exists if the $5 million amount in controversy is satisfied.[1]

In almost all of the pre-CAFA cases filed by Plaintiff's counsel, the amounts in controversy were well in excess of $5 million. When the cases settled, the attorneys' fees alone amounted to substantially in excess of $5 million. *See* App. 46. After CAFA took

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[1] The "home state" and "local controversy" exceptions in CAFA are inapplicable where no defendant is a citizen of the state where suit is filed. *See* 28 U.S.C. §§ 1332(d)(3), (4).

effect, Plaintiff's counsel initially did not file any new class action lawsuits in Miller County Circuit Court. Then, beginning in 2010, Plaintiff's counsel started to file new class actions in Miller County Circuit Court similar to the pre-CAFA cases. In these post-CAFA cases, Plaintiff's attorneys have attempted to circumvent CAFA by utilizing the following procedural maneuver: although the actual amount in controversy on the claims pleaded exceeds $5 million, the complaint is accompanied by a "stipulation" that purports to be "binding" and to limit to under $5 million not only the named plaintiff's own damages, but also the damages of the putative class members the plaintiff hopes to, but does not yet, represent. Here, Plaintiff's Complaint was accompanied by a signed affidavit by Plaintiff that:

> I do not now, and will not at any time during this case, whether it be removed, remanded, or otherwise . . . *seek damages for the class as alleged in the complaint to which this stipulation is attached* in excess of $5,000,000 in the aggregate (inclusive of costs and attorneys' fees).
>
> I understand that this stipulation is binding, and it is my intent to be bound by it. (App. 75 (emphasis added).)

Plaintiff alleged in his Complaint that this "stipulation" was "binding on Plaintiff for purposes of establishing the amount in controversy," and "[a]s such, there is neither diversity nor Class Action Fairness Act ('CAFA') jurisdiction for this claim in federal

court." App. 60. But Plaintiff left open some doors to potentially modify or negate his "stipulation" at a later date. The "stipulation" is carefully worded in an attempt to avoid limiting the damages the Plaintiff could *accept* for the class if awarded at trial. The "stipulation" is also worded so that it will not apply if the class definition is altered at a later point.

Plaintiff's attorneys have used this tactic in filing dozens of post-CAFA cases, all of them purporting to be worth just under $5 million. They have persuaded several Arkansas federal district court judges, and, just recently, the Eighth Circuit, to approve the use of this tactic to keep a class action in state court. Similar tactics have been used elsewhere (*see infra* at 12-13), but by far the largest number of these stipulations has been filed in the Miller County Circuit Court.

C. Proceedings Below

Standard Fire removed this case from the Miller County Circuit Court to the Western District of Arkansas, and Plaintiff moved to remand. Under Eighth Circuit precedent, if a defendant removing a case under CAFA proves the amount in controversy by a preponderance of the evidence, the burden shifts to the plaintiff to "establish to a legal certainty that the claim is for less than the requisite amount." *Bell v. Hershey Co.*, 557 F.3d 953, 956 (8th Cir. 2009). Plaintiff did not challenge this burden below. The district court held that Standard Fire had satisfied its burden

of establishing, by a preponderance of the evidence, that the $5 million threshold was satisfied. App. 8. The district court concluded, however, that Plaintiff's "stipulation" was sufficient for him to prove to a "legal certainty" that the amount in controversy fell below $5 million. The district court held that a named plaintiff can avoid removal under CAFA by stipulating to a purportedly "binding" limit on the damages being sought for the members of the proposed class, even though the named plaintiff, the only party executing this stipulation, has never been authorized to represent the class members or to stipulate away their rights. App. 9-10.

Standard Fire petitioned the Eighth Circuit for permission to appeal pursuant to CAFA, 28 U.S.C. § 1453(c)(1). The court of appeals denied permission to appeal without explanation. App. 1. Standard Fire then petitioned for rehearing *en banc*. After requesting a response to Standard Fire's petition for rehearing, *see* App. 17, the court of appeals issued a new opinion on the issue presented by Standard Fire's petition. In *Rolwing v. Nestle Holdings, Inc.*, 666 F.3d 1069 (8th Cir. 2012), the court of appeals affirmed an order of remand under CAFA based on a "stipulation" by the named plaintiff purporting to limit the damages of putative class members to below $5 million. Such a "stipulation" was allowed to defeat federal jurisdiction even where the actual amount in controversy otherwise was over $12 million, more than twice the $5 million threshold. *Id.* at 1072. After issuing the opinion in *Rolwing*, in the instant case the court of

appeals denied rehearing *en banc* and by the panel without comment. App. 16.

REASONS FOR GRANTING THE WRIT

The decisions below violate the constitutional rights of proposed class members and basic principles of removal law and class action law. It is well-settled that the amount in controversy is determined at the time of removal, and cannot be based on any events that may occur subsequent to removal. *St. Paul Mercury Ins. Co. v. Red Cab Co.*, 303 U.S. 283, 293 (1938). Under this Court's recent decision in *Smith v. Bayer Corp.* and longstanding principles of class action law, putative class members are *not* bound by actions taken by named plaintiffs or litigation outcomes before certification. A named plaintiff has *no* right to stipulate to a binding cap on the damages of people he or she does not represent. Such a limitation, if effective at the time suit is filed, would violate the due process rights of the proposed class members. Any such "stipulation" is therefore a nullity that must be disregarded in determining jurisdiction.

I. THE LOWER COURTS IMPROPERLY FAILED TO FOLLOW THIS COURT'S OPINION IN *SMITH v. BAYER CORP.*

A. The Orders Below are Contrary to *Smith v. Bayer Corp.*

The Eighth Circuit's conclusion in *Rolwing* is erroneous. A named plaintiff, at the time of filing a complaint, does not have any authority to cap damages of proposed class members he or she does not represent. Last Term, in *Smith v. Bayer Corp.*, another case from the Eighth Circuit, this Court reversed the court of appeals and held that members of a proposed class are *not* parties to a case and that the named plaintiff does *not* represent them unless and until a class is certified. The Court adopted a rule that "in the absence of certification . . . [n]either a proposed class action nor a rejected class action may bind nonparties," and "the mere proposal of a class . . . could not bind persons who were not parties." *Smith*, 131 S. Ct. at 2380, 2382 (emphasis added). Under *Smith*, Plaintiff's unauthorized "stipulation" on behalf of people he has not been authorized to represent is a legal nullity.

Plaintiff *conceded* in the court of appeals that, under *Smith*, "[i]t is true, of course, that merely filing a proposed class action will not 'bind' proposed class members" and that "the due process rights of such proposed class members are always protected before any such decisions [limiting damages] are considered 'binding.'" App. 27, 29. A concededly non-binding stipulation *cannot*, as a matter of law, "establish to a

legal certainty that the claim is for less than the requisite amount" for federal jurisdiction. *Bell*, 557 F.3d at 956; *see also St. Paul Mercury*, 303 U.S. at 289-90 (federal jurisdiction exists unless it "appear[s] to a legal certainty that the claim is really for less than the jurisdictional amount"); *Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830 (7th Cir. 2011) ("[w]hat [the named plaintiff] is willing to accept thus does not bind the class and therefore does not ensure that the stakes fall under $5 million"); *Pfizer, Inc. v. Lott*, 417 F.3d 725, 725 (7th Cir. 2005) (stipulation by the named plaintiffs regarding damages "would not bind the other members of the class"); *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 724 (5th Cir. 2002) ("it is improbable that [plaintiff] can ethically unilaterally waive the rights of the putative class members to attorney's fees without their authorization"); *Bass v. Carmax Auto Superstores, Inc.*, 2008 U.S. Dist. LEXIS 11180, at *6 (W.D. Mo. Feb. 14, 2008) ("Plaintiff has no right to limit or compromise the recovery of the class without Court approval, particularly before she has even been approved as a representative for the class."); *Fiore v. First American Title Ins. Co.*, 2005 WL 3434074, at *3 (S.D. Ill. Dec. 13, 2005) ("Plaintiff cannot in good faith place a $5,000,000 limitation on the recovery of the putative class"); *Belin v. Int'l Paper Co.*, 2011 U.S. Dist. LEXIS 69449, at *7 (W.D. La. June 27, 2011) ("although the class representatives appear willing to waive their own claims for damages in excess of the jurisdictional threshold, they do not have authority to waive damages on behalf of other unnamed

class members"); *Reagan v. ArcelorMittal*, 2012 WL 1023107, at *2 (E.D. Tenn. Mar. 26, 2012) (named plaintiff's disclaimer of damages over $5 million did not preclude removal where defendant demonstrated an amount in controversy over $5 million).

Because the amount in controversy is determined solely as of the time of removal, *see St. Paul Mercury*, 303 U.S. at 293, and because the stipulation was not binding at the time of removal, the stipulation must be disregarded in determining whether federal jurisdiction exists. The district court held that, absent Plaintiff's stipulation, federal jurisdiction exists in this case. App. 8. This Court should therefore grant certiorari, reaffirm *Smith*, and reverse the judgment of the court of appeals. *See* Eugene Gressman et al., SUPREME COURT PRACTICE 250 (9th ed. 2007) ("Where the decision of the court of appeals clearly fails to apply prior Supreme Court decisions because of error or oversight, the Court usually grants certiorari. Often in such circumstances the Court will reverse summarily without oral argument or merits briefing, typically through a brief per curiam opinion.").

B. The Orders Below Violate the Due Process Rights of Absent Putative Class Members

Allowing a named plaintiff to bind absent putative class members to a limitation on damages, and giving effect to such a "stipulation" as of the time of removal, plainly violates basic due process rights of the absent

putative class members. This Court has held that a state court *cannot* bind members of a putative class before providing them with adequate notice and an opportunity to be heard. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985) ("If the forum State wishes to bind an absent plaintiff [class member] concerning a claim for money damages . . . [t]he plaintiff must receive notice plus an opportunity to be heard and participate in the litigation"). Here, the absent putative class members did not receive any notice, and therefore had no opportunity to be heard. Treating Plaintiff's "stipulation" as binding at the time of removal would violate the due process rights of these absent putative class members.

Sanctioning Plaintiff's stipulation device jeopardizes the rights of the putative class members. As Judge Posner recently explained, in class actions "[t]he court takes the place, as monitor of counsel, of the nominal clients," to protect the interests of the putative class. *See Creative Montessori Learning Centers v. Ashford Gear LLC*, 662 F.3d 913, 917 (7th Cir. 2011). In enacting CAFA, Congress recognized this important role of the court, and specifically acknowledged the need to eliminate class action settlements in which "[class] counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value," or "confusing notices are published that prevent class members from being able to fully understand and effectively exercise their rights." Pub. L. No. 109-2, § 2(3)(A), (C). To remedy these problems, CAFA provides various safeguards to

protect class members in proposed settlements made in federal court. *See* 28 U.S.C. §§ 1711-1715. But many states, including Arkansas, have no equivalent provisions. Some of the pre-CAFA settlements in Miller County likely would not have survived CAFA scrutiny. *See, e.g.*, "Judge OKs $90M 'click fraud' settlement," *Associated Press Financial Wire*, July 29, 2006 ("No one will receive cash except the lawyers, who will split $30 million."); 28 U.S.C. § 1712 (providing for special judicial scrutiny of coupon settlements and limiting attorneys' fees awards for such settlements). Plaintiff's "device," if sanctioned, will deprive absent class members of the benefit of a federal ruling on any proposed settlement in accordance with CAFA.

C. The Orders Below Contravene the Text of CAFA and the Intent of Congress

There is nothing in the text of CAFA that permits a plaintiff to limit the damages of putative class members he or she is not authorized to represent. The pertinent statutory text provides that "the claims of the individual class members *shall be aggregated* to determine whether the amount in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs." 28 U.S.C. § 1332(d)(6) (emphasis added). CAFA thus requires the aggregation of the full claims of the putative class members as alleged in the complaint. It does not provide that full aggregation is optional, or that aggregation can be followed by a reduction of the aggregate amount to under $5 million based on a "stipulation" of a putative class

representative not yet appointed to represent a class. In the present case, the trial court found that the claims of the individual class members, when aggregated, exceeded $5 million, but that the plaintiff was able to defeat federal jurisdiction by "stipulating" to a reduction in the aggregate amount of the claims. Congress did not provide class action plaintiffs with the ability to defeat federal jurisdiction in this manner.

The decisions below are also contrary to the expressed purpose of CAFA. Congress intended CAFA to "enable[ ] defendants to remove to federal court any sizable class action involving minimal diversity of citizenship," *Smith*, 131 S. Ct. at 2382, because "Congress sought to check what it considered to be the overreadiness of some state courts to certify class actions." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1473 (2010). In enacting CAFA, Congress found that "[a]buses in class actions undermine the National judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States constitution. . . ." Pub. L. No. 109-2, § 2(a)(4).

If federal courts permit the use of stipulations by plaintiffs to avoid CAFA, "Congress's obvious purpose in passing [CAFA] – to allow defendants to defend large interstate class actions in federal court – can be avoided almost at will. . . ." *Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 407 (6th Cir. 2008). In *Rolwing*, for example, the actual amount in controversy was over $12 million, but the court of appeals allowed the plaintiff to "stipulate away" over $7

million of the potential class recovery (approximately 60%) so that he could deprive the nonresident defendant of a federal forum and litigate in state court. *See Rolwing*, 660 F.3d at 1070-71. Such a result defeats the defendant's right of removal even where it can show that all of the requirements for CAFA jurisdiction are met, including an actual amount in controversy on the allegations pled that exceeds $5 million. Congress's plain intent to provide defendants with a federal forum in these cases is defeated.

The federal courts have long rejected improper devices contrived by creative plaintiffs' attorneys to prevent removal, such as fraudulent joinder of nondiverse parties. As this Court explained in upholding the fraudulent joinder doctrine, "the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction." *Wecker v. National Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907). The same holds true today. The "device" employed by Plaintiff here is the post-CAFA equivalent of fraudulent joinder.

D. Several Circuits Disagree With the Eighth Circuit's Approach

Several circuits, at least in dicta, have rejected the Eighth Circuit's view on the effect of "stipulations" that purport to limit damages in putative class

actions. The Sixth Circuit explained that "[a] disclaimer in a complaint regarding the amount of recoverable damages does not preclude a defendant from removing the matter to federal court upon a demonstration that damages are more likely than not to meet the amount in controversy requirement, but it can be sufficient absent adequate proof from defendant that potential damages actually exceed the jurisdictional threshold." *Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 405, 407 (6th Cir. 2007). The Seventh Circuit reasoned that a named plaintiff "has a fiduciary duty to its fellow class members" and "[w]hat [the named plaintiff] is willing to accept thus does not bind the class and therefore does not ensure that the stakes fall under $5 million." *Back Doctors*, 637 F.3d at 830; *see also Pfizer*, 417 F.3d at 725 (explaining that stipulation by the named plaintiffs regarding damages "would not bind the other members of the class"). The Fifth Circuit has noted that "it is improbable that [plaintiff] can ethically unilaterally waive the rights of the putative class members to attorney's fees without their authorization." *Manguno*, 276 F.3d at 724. An unpublished opinion by the Fifth Circuit involving traditional diversity jurisdiction also noted that the named plaintiffs did not have "the authority to deny other members of their putative class action the right to seek an award greater than $75,000." *Ditcharo v. UPS*, 376 Fed. Appx. 432, 437 (5th Cir. 2010). A number of district courts likewise have held that named plaintiffs have no right to place a dollar limit on proposed class members' damages to avoid federal jurisdiction under CAFA. *See*

Bass, 2008 U.S. Dist. LEXIS 11180, at *6; *Fiore*, 2005 WL 3434074, at *3; *Belin*, 2011 U.S. Dist. LEXIS 69449, at *7; *Reagan*, 2012 WL 1023107, at *2.

While the Eighth Circuit, in *Rolwing*, was the first court of appeals to address the question presented squarely, this error is likely to go uncorrected for a long time if this Court waits for an express circuit split to develop. The use of "stipulations" by named plaintiffs is concentrated in specific state courts where the judicial environment is so plaintiff-friendly that plaintiffs' attorneys can potentially wreak havoc on corporate defendants in a "less-than-$5 million" class action. Indeed, it appears that more of these "stipulations" have been filed in the Miller County Circuit Court (and by the same counsel) than in any other court nationwide. It could take many years, and cost corporate defendants billions of dollars, if this Court waits for an express circuit split to develop on this important national issue.

Seven years after CAFA's enactment, the time has come for this Court to take its first CAFA case. By deciding the question presented here, this Court will determine whether CAFA is a strong remedy for state court abuses in class actions, as Congress expressly intended, or if it has a loophole that allows plaintiffs' lawyers to easily avoid federal jurisdiction. This issue merits this Court's review because of its importance to the federal-court system, class action litigation, and our Nation's economy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 11-8030

Greg Knowles, Individually and as Class Representative on Behalf of all Similarly Situated Persons

Respondent

v.

The Standard Fire Insurance Company

Petitioner

Appeal from U.S. District Court for the
Western District of Arkansas – Texarkana
(4:11-cv-04044-PKH)

JUDGMENT

The Petition for permission to file an interlocutory appeal has been considered by the court and is denied.

January 04, 2012

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

GREG KNOWLES, Individually
and as Class Representative
on Behalf of all Similarly
Situated Persons within
the State of Arkansas, PLAINTIFF

v. No. 4:11-cv-04044

THE STANDARD FIRE
INSURANCE COMPANY, DEFENDANT

MEMORANDUM OPINION AND ORDER

(Filed Dec. 2, 2011)

Currently before the Court are Plaintiff's Motion to Remand and supporting Memorandum of Law (Docs. 6-7) and Defendant's Response (Doc. 9). Plaintiff disputes the existence of diversity jurisdiction in this case, as he contends that the amount in controversy does not exceed the sum or value of $5,000,000, pursuant to the jurisdictional requirements described in the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d). For the reasons reflected herein, Plaintiff's Motion to Remand (Doc. 6) is **GRANTED**, and this case is remanded to the Circuit Court of Miller County, Arkansas.

I. Background

On April 13, 2011, Plaintiff Greg Knowles filed a putative class action complaint in the Circuit Court

of Miller County, Arkansas, against Defendant The Standard Fire Insurance Company alleging breach of contract due to Defendant's underpayment of claims for loss or damage to real property made pursuant to certain homeowners insurance policies. *See* Doc. 2, ¶ 32. Plaintiff's home was damaged by hail on or about March 10, 2010, and thereafter, Plaintiff requested payment from Defendant for this damage. Plaintiff alleges that under the homeowners policy of insurance issued by Defendant, Plaintiff and others similarly situated were entitled to be fully reimbursed for such loss or damage but were not fully reimbursed. Specifically, Plaintiff asserts that Defendant failed to pay for charges reasonably associated with retaining the services of a general contractor to repair or replace damaged property. These charges, known as general contractors' overhead and profit ("GCOP"), comprise an extra 20% fee routinely assessed by contractors when repairing damaged property. *Id.* at ¶¶ 1-4. According to Plaintiff, Defendant fraudulently concealed its obligation to pay GCOP charges and forced Plaintiff to bear this cost and suffer the ensuing damage. *Id.* at ¶¶ 33-45. The purported class of persons injured by Defendant's alleged breach of contract for failure to pay GCOP on homeowners insurance contracts includes "hundreds, and possibly thousands, of individuals geographically dispersed across Arkansas . . . " *Id.* at ¶ 26.

Defendant removed this case to federal court on May 18, 2011, arguing that Plaintiff fraudulently framed the definition of the purported class in order

to limit recovery to two years, rather than the five years available under the applicable statute of limitations. Defendant also asserted that although Plaintiff signed a stipulation limiting his and the purported class's recovery, Plaintiff's counsel failed to sign a stipulation that they would not seek or accept an award of attorneys' fees that would allow the total amount in controversy to exceed state court jurisdictional limits. Moreover, Defendant maintained that Plaintiff lacked the authority to place a limit on recovery that would bind the other class members.

On June 6, 2011, Plaintiff moved to remand the case back to state court, citing in support of his motion his binding stipulation executed prior to removal, which expressly limited his and the class's recovery to within state jurisdictional limits. Plaintiff also asserted that as master of his Complaint, he had the right to limit his claims so as to bring this action in the forum of his choice. *See* Doc. 7, pp. 5-6.

II. Legal Standard

When analyzing the propriety of removal of a case to federal court, the removing party has the burden of showing that jurisdiction in the federal courts is proper and the requisite amount in controversy has been met. *Hatridge v. Aetna Cas. & Sur. Co.*, 415 F.2d 809, 814 (8th Cir. 1969). Federal courts must strictly construe the federal removal statute and resolve any ambiguities about federal jurisdiction in favor of remand. *Transit Casualty Co. v. Certain*

Underwriters at Lloyd's of London, 119 F.3d 619, 625 (8th Cir. 1997).

CAFA operates to grant federal district courts original jurisdiction over class actions where there is diversity of citizenship between the plaintiff and defendant and when "the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs." 28 U.S.C. § 1332(d)(2). The claims of the potential class members must be aggregated to determine whether the jurisdictional minimum has been met. 28 U.S.C. § 1332(d)(6). The guiding principal courts follow in establishing whether or not removal is proper is that the plaintiff is the master of his complaint, even in class action cases. *Bell v. Hershey Co.,* 557 F.3d 953, 956 (8th Cir. 2009). Therefore, in determining the amount in controversy, a court looks first to the complaint. "If [a plaintiff] does not desire to try his case in the federal court, he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove." *St. Paul Mercury Indem. Co. v. Red Cab Co.,* 303 U.S. 283, 294 (1938).

Generally, "the sum claimed by the plaintiff controls if the claim is apparently made in good faith." *Id.* at 289. Although Plaintiff in the instant case does not claim to be owed a specific dollar amount in damages, he does impose a limitation on the amount he and the purported class may recover. In his Complaint, Plaintiff states that "neither Plaintiff's nor any individual Class Member's claim is equal to or greater than seventy-five thousand dollars ($75,000),

inclusive of costs and attorneys fees, individually or on behalf of any Class Member . . . Moreover, the total aggregate damages of the Plaintiff and all Class Members, inclusive of costs and attorneys' fees, are less than five million dollars ($5,000,000), and the Plaintiff and Class stipulate they will seek to recover total aggregate damages of less than five million dollars ($5,000,000)." Doc. 2, ¶ 11.

Exhibit A attached to the Complaint is a "Sworn and Binding Stipulation," signed by Plaintiff, affirming that he will not at any time during the pendency of the case "seek damages for myself or any other individual class member in excess of $75,000 (inclusive of costs and attorneys' fees) or seek damages for the class as alleged in the complaint to which this stipulation is attached in excess of $5,000,000 in the aggregate (inclusive of costs and attorneys' fees)." *Id.* at p. 16.

To defeat remand, a defendant has the burden of showing by a preponderance of the evidence that the amount in controversy exceeds the federal court's minimum threshold for jurisdiction, which is $5 million in the aggregate. *In re Minn. Mut. Life Ins. Co. Sales Practices Litig.*, 346 F.3d 830, 834 (8th Cir. 2003). The Court must engage in a "fact intensive" inquiry to determine whether the preponderance of the evidence standard has been met. *Bell,* 557 F.3d at 959. Mere speculation or conjecture on the part of the defendant as to the amount in controversy will not be sufficient to meet the preponderance standard. *See, e.g., Thomas v. Southern Pioneer Life Ins. Co.,* 2009

WL 4894695, *2 (E.D. Ark. Dec. 11, 2009); *Nowak v. Innovative Aftermarket Sys.*, 2007 WL 2454118 (E.D. Mo. Aug. 23, 2007).

Once the preponderance standard is met and the defendant establishes enough detail to meet the jurisdictional requirement for the amount in controversy, the court turns its attention to the plaintiff, who must establish "to a legal certainty" that his claim is actually under the $5 million threshold. *Bell,* 557 F.3d at 956 (*citing St. Paul Mercury,* 303 U.S. at 290). Any doubt as to federal jurisdiction must be resolved in favor of remand. *In re Prempro Prods. Liab. Litig.*, 591 F.3d 613, 620 (8th Cir. 2010).

III. Discussion

A. Defendant's Legal Burden: Preponderance of the Evidence

Defendant has presented evidence to the Court that the class as defined in Plaintiff's Complaint has an actual amount in controversy of slightly over $5 million (*see* Doc. 9-9).[1] Defendant arrives at that figure by calculating the GCOP at 20% of the total

[1] Defendant submitted alternate sets of data to the Court: one for a class spanning two years of recovery, and one for a class spanning five years of recovery. As explained in further detail below, the Court finds that Plaintiff has the right to limit the class to a two-year period of recovery for purposes of calculating damages. Accordingly, the data referred to in the Court's discussion pertains to the two-year period set forth in Plaintiff's Complaint.

damages purportedly owed to class members over the course of two years. This GCOP total for the proposed class is $3,054,961. *See* Doc. 1, ¶ 17. Added to that are a 12% statutory penalty for breach of contract and an award of attorneys' fees amounting to 40% of the presumed recovery, plus pre-judgment interest. Defendant arrives at the 40% figure on attorneys' fees by referencing a similar case in which the Arkansas Court of Appeals calculated an attorney fee award in an insurance case using 40% of the damages awarded. *See* Doc. 9, pp. 9-10. When Defendant's projection for the cost of Plaintiff's attorneys' fees is added in, this brings the total award up to $5,024,150, which exceeds the statutory maximum for state court jurisdiction by $24,150.

The affidavit of Brian N. Harton, Director of Product Management for Defendant, attests that the damages total submitted, excluding the penalty and attorneys' fees, is true and correct. Doc. 9-9. Overall, considering the briefing and evidence before the Court, Defendant's calculations do not appear to be mere speculation or conjecture. Moreover, Plaintiff has failed to counter Defendant's estimates with evidence or argument. Therefore, the Court considers Defendant to have satisfied its initial burden of proving by a preponderance of the evidence that the actual amount in controversy reaches, if not exceeds, the federal court's minimum threshold for jurisdiction pursuant to CAFA.

B. Plaintiff's Legal Burden: Legal Certainty

Now that Defendant has met its burden of proof, the burden shifts to Plaintiff to prove to a legal certainty that his claim falls under the $5 million threshold for remand to state court. The question is whether a plaintiff may meet his burden of proof by stipulating at the time the complaint is filed that he will not seek more than the federal jurisdictional minimum for himself and the putative class. Even though the *Bell* court did not specifically reference the legal certainty burden, it did conclude that a clear stipulation would meet the requirements for defeating removal. It follows, therefore, that if a stipulation is legally binding and made in good faith, it can satisfy the plaintiff's legal certainty burden and defeat removal. *Bell,* 557 F.3d at 956; *see also Tuberville v. New Balance Athletic Shoe, Inc.,* 2011 WL 1527716, *3 (W.D. Ark., April 21, 2011).

1. Plaintiff's Stipulation

The law in this circuit is clear that a binding stipulation sworn by a plaintiff in a purported class action will bar removal from state court if the stipulation limits damages to the state jurisdictional minimum. *Bell,* 557 F.3d at 958, *citing De Aguilar v. Boeing Co.,* 47 F.3d 1404, 1412 (5th Cir. 1995) ("In order to ensure that any attempt to remove would have been unsuccessful, [plaintiff] Bell could have included a binding stipulation with his petition stating

that he would not seek damages greater than the jurisdictional minimum upon remand"). Various federal courts in Arkansas, including this one, have remanded several purported class actions to state court using the guideline set forth in *Bell* regarding the effect of a plaintiff's binding stipulation. *See, e.g., Thompson v. Apple, Inc.*, 2011 WL 2671312 (W.D. Ark. July 8, 2011); *Tomlinson v. Skechers U.S.A., Inc.*, Case No. 5:11-CV-05042-JLH (W.D. Ark. May 25, 2011); *Murphy v. Reebok Int'l, Ltd.*, 2011 WL 1559234 (E.D. Ark. April 22, 2011); *Tuberville v. New Balance Athletic Shoe, Inc.*, 2011 WL 1527716 (W.D. Ark. April 21, 2011).

Defendant claims that Plaintiff's sworn stipulation is invalid for two reasons. First, Defendant contends that the wording of the stipulation telegraphs Plaintiff's desire to circumvent CAFA and receive an award in excess of the $5 million threshold. Plaintiff's stipulation states that he "will not . . . seek" damages in excess of $5 million in the aggregate. This language does not adequately bind Plaintiff, according to Defendant, because Plaintiff has not "refused to accept" a damage award in excess of the maximum. Defendant fears that Plaintiff's choice of the word "seek" is intentionally made in order to leave open the door for a larger award than the maximum allowed in state court. Defendant cites no authority to support its view that Plaintiff's promise not to "seek" an award over jurisdictional limits is unenforceable, but "refusing to accept" such an award would be binding. Magic words or blood oaths are not required in order

to make a sworn stipulation binding. The Court finds Plaintiff's sworn stipulation is sufficient and meets the standard suggested by the Eighth Circuit in *Bell* to effectively bar removal. Plaintiff would also be judicially estopped from asserting a claim in state court for attempting to recover more than the amount contemplated in the stipulation. *See Thompson*, 2011 WL 2671312 at *3, *citing Dupwe v. Wallace*, 140 S.W.3d 464, 467 (Ark. 2004); *see also Tuberville*, 2011 WL 1527716 at *4.

The second argument Defendant makes regarding the stipulation has to do with attorneys' fees. Defendant contends that because Plaintiff's counsel did not sign the stipulation, this means that the attorneys' fees and costs in this case will not be limited by the stipulation and may exceed the statutory maximum of $5 million. Essentially, Defendant makes the argument that, despite Plaintiff's sworn stipulation to the contrary, Plaintiff's counsel intends to abuse CAFA's intent by exceeding the jurisdictional minimum after remand and seeking a large fee award. Defendant cites to examples of other class action lawsuits involving Plaintiff's counsel in which counsel received large attorneys' fee awards, ostensibly to show that large fee awards in other cases will translate to a large fee award in the case at bar. Despite Defendant's arguments, however, the Court finds that Plaintiff's sworn stipulation is sufficient to limit the total award, including the award for attorneys' fees. The stipulation is explicitly "inclusive of costs and

attorneys' fees," and the same limitation is present in the text of the Complaint.

The overarching argument Defendant submits is that the Court should completely disregard Plaintiff's self-imposed limitations in his Complaint and attached stipulation, and instead calculate the amount in controversy based on the possibility that Plaintiff could amend his Complaint in the future to increase the amount of recovery sought. Speculation as to Plaintiff's future actions cannot vest this Court with jurisdiction where it otherwise has none at the time of removal. If a court could base its jurisdiction solely upon the possibility of a future amendment by a plaintiff, any case filed in state court would be susceptible to removal no matter how the plaintiff stated his claims.

The Arkansas legislature has addressed this very issue in passing a statute this year that codifies *Bell* and explicitly allows a plaintiff to file a binding stipulation "with respect to the amount in controversy" in order to establish subject matter jurisdiction. *See* Ark. Code Ann. § 16-63-221(a). Defendant reads a portion of this statute to "[provide] an avenue for plaintiffs to attempt to evade their initial stipulations about the amount in controversy." Doc. 9, p. 24. The Court disagrees with Defendant's characterization of the statute and finds that it merely preserves a plaintiff's option to amend the Complaint in the future. *See* Ark. Code Ann. § 16-63-211(b) ("A Declaration . . . is binding on the Plaintiff with respect to the amount in controversy unless the Plaintiff

subsequently amends the complaint to pray for damages in an amount which exceeds the jurisdictional limits of the Court . . . ").

Defendant's concern about Plaintiff's future amendment of the Complaint is of no moment. If Plaintiff were to amend his Complaint after remand, disclaiming his sworn stipulation and seeking instead an amount in excess of the jurisdictional maximum, it follows that Defendant would have the right to remove again, should removal be justified. It is no longer the rule that CAFA cases must be removed within a year. Now they may be removed at any time, assuming they are removable. 28 U.S.C. § 1453(b); *see e.g. Bartnikowski v. NVR Inc.*, 307 Fed. Appx 730, 739 (4th Cir. 2009) ("a CAFA defendant who cannot meet his burden for removal at the early stages of litigation may still have recourse to the federal courts later, as Congress has eliminated the one-year time limit on CAFA removal actions"); *Lowdermilk v. U.S. Bank Nat'l Assoc.*, 479 F.3d 994, 1002-03 (9th Cir. 2007) ("CAFA mitigates some of the potential for abuse [by plaintiffs] by eliminating the one-year removal limitation"). In short, Defendant's fear regarding Plaintiff's plans for the future of this litigation cannot drive the Court's decision on remanding the case, considering Plaintiff's legal and binding stipulation limiting the dollar amount of aggregate recovery.

2. Due Process Concerns for the Class

Defendant believes Plaintiff has exhibited bad faith in seeking to limit the as-yet-unknown class members to damages over a two-year period, rather than the full five years of damages potentially recoverable under the statute of limitations. *See* Doc. 9, p. 13. As the master of his complaint, Plaintiff may choose what claims to bring and what claims to leave out. "[A] removing defendant can't make the plaintiff's claim for him; as master of the case, the plaintiff may limit his claims (either substantive or financial) to keep the amount in controversy below the threshold." *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 449 (7th Cir. 2005). Defendant fails to cite any authority which states that a plaintiff may not seek to recover damages for a period of time shorter than the statute of limitations provides. Nor is the Court persuaded that Plaintiff's temporal limitation on recovery evidences his bad faith.

Defendant cites to the case of *Bass v. Carmax Auto Superstores, Inc.*, 2008 WL 441962 (W.D. Mo., Feb. 14, 2008), for the proposition that a class plaintiff has no right to limit recovery for a class without court approval. However, the *Bass* case was decided before *Bell,* and the holding in *Bass* contradicts both the plain language and the spirit of the Eighth Circuit's holding in *Bell.* Furthermore, putative class members may simply opt out of the class and pursue their own remedies if they feel that the limitations placed on the class by Plaintiff are too restrictive. *See Murphy,* 2011 WL 1559234 at *3 (" . . . the plaintiffs

in state court who choose not to opt out of the class must live with it," *quoting Morgan v. Gay*, 471 F.3d 469, 477-78 (3rd Cir. 2006), *cert. denied*, 128 S. Ct. 66 (2007)).

III. Conclusion

The Court finds that Plaintiff has shown to a legal certainty that the aggregate damages claimed on behalf of the putative class shall in good faith not exceed the state court's jurisdictional limitation of $5,000,000. Accordingly, Plaintiff's Motion to Remand (Doc. 6) is hereby **GRANTED**. This case shall be remanded forthwith to the Circuit Court of Miller County, Arkansas.

IT IS SO ORDERED this 2nd day of December, 2011.

/s/ P.K. Holmes, III
P.K. HOLMES, III
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 11-8030

Greg Knowles, Individually and as Class Representative on Behalf of all Similarly Situated Persons

Respondent

v.

The Standard Fire Insurance Company

Petitioner

Appeal from U.S. District Court for the Western District of Arkansas – Texarkana
(4:11-cv-04044-PKH)

ORDER

The petition for rehearing *en banc* is denied. The petition for panel rehearing is also denied.

March 01, 2012

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

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January 24, 2012

Mr. Richard Eugene Norman
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RE: 11-8030 The Standard Fire Insurance Co v. Greg Knowles

Dear Counsel:

A petition for rehearing with petition for rehearing en banc has been filed by the petitioner in the above case. I have been instructed by the court to request that you respond to the petition.

Please electronically file your response, limited to ten pages, by February 3, 2012. If you have any questions concerning the court's request, please contact this office.

Michael E. Gans
Clerk of Court

LMT

cc: Mr. Wystan M. Ackerman
Mr. Michael B. Angelovich
Mr. Stephen Edward Goldman
Mr. John Clinton Goodson
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Ms. Lyn Peoples Pruitt
Mr. Brad E. Seidel

District Court/Agency Case
Number(s): 4:11-cv-04044-PKH

8th Circuit No. 11-8030

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

GREG KNOWLES,
Plaintiff-Respondent

v.

THE STANDARD FIRE INSURANCE COMPANY.
Defendant-Petitioner.

On Appeal from the United States District Court
For the Western District of Arkansas
Case No. 11-cv-04044
The Honorable P.K. Holmes III

RESPONSE TO PETITION FOR REHEARING EN BANC

(Filed Feb. 3, 2012)

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This Court's decision denying Defendant's petition under 28 U.S.C. § 1453(c) for Leave to Appeal was correct. The district court's decision ordering remand was proper, and the reasoning underlying

that decision was recently confirmed by this Court in No. 11-3445, *Rolwing v. Nestle Holding, Inc.* (Feb. 2, 2012). Defendant's request for rehearing should be denied.

1. Plaintiff filed this action in state court, alleging state-law claims, proposing a class of Arkansas residents, and expressly seeking less than the federal jurisdiction minimums. Doc. 2.[1] Plaintiff alleges breach of contract due to underpayment of claims made pursuant to homeowner insurance policies. *Id.* Plaintiff also filed a sworn stipulation stating he will never seek more than $5 million for the proposed class. *Id.* at 16. Defendant removed claiming jurisdiction under 28 U.S.C. § 1332(d) ("CAFA"). Defendant presented evidence below that – assuming the class recovered all damages alleged plus a 12% statutory penalty combined with an unlikely attorney's fee of ***40%*** of the entire class recovery (a percentage far outside the norm awarded in class actions in Arkansas state court and federal courts in this circuit) – an award *might* (absent Plaintiff's stipulation) be $5,024,150 – or just $24,150 over CAFA's $5 million threshold. Doc. 13 at 5. Thus, the district court required Plaintiff "to prove to a legal certainty that his claim falls under the $5 million threshold." *Id.* at 6. The court then applied the rule that "if a stipulation is legally binding and made in good faith, it can satisfy the plaintiff's legal

[1] References to the record below are in the form "Doc. [docket entry number] [page number]."

certainty burden and defeat removal." *Id.*, citing *Bell v. Hershey Co.*, 557 F.3d 953, 956 (8th Cir. 2009). Finding "Plaintiff has shown to a legal certainty that the aggregate damages claimed on behalf of the putative class shall ***in good faith*** not exceed the state court's jurisdictional limitation of $5,000,000," the court granted the motion to remand. Doc. 13 at 10 (emphasis supplied).

2. "The enactment of CAFA did not alter the proposition that the plaintiff is the master of the complaint." *Bell*, 557 F.3d at 956, citing *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 449 (7th Cir. 2005) ("a removing defendant can't make the plaintiff's claim for him; as master of the case, the plaintiff may limit his claims (either substantive or financial) to keep the amount in controversy below the threshold."); *Morgan v. Gay*, 471 F.3d 469, 474 (3d Cir. 2006), cert. denied, 128 S. Ct. 66 (2007) (plaintiff may limit recovery to avoid CAFA jurisdiction); *Lowdermilk v. U.S. Bank Nat'l Ass'n*, 479 F.3d 994, 1000 at n. 5 (9th Cir. 2007) (noting, in post-CAFA class action, that a "plaintiff may, of course, stipulate to damages in order to avoid federal jurisdiction"); *Freeman v. Blue Ridge Paper Products, Inc.*, 551 F.3d 405, 409 (6th Cir. 2008) ("plaintiffs can avoid removal under CAFA by limiting the damages they seek"). Long before CAFA, the Supreme Court explained, "[i]f [the plaintiff] does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant

cannot remove." *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938).[2] Even as state law construing *ad damnum* clauses became less strict, federal courts consistently recognized that plaintiffs could nonetheless avoid removal by filing a binding stipulation. *See In re Shell Oil Co.*, 970 F.2d 355, 356 (7th Cir. 1992) ("[l]itigants who want to prevent removal must file a binding stipulation or affidavit with their complaints"). "[I]t is to be assumed that Congress was aware of established rules of law applicable to the subject matter of the statute and thus, upon enactment, the statute is to be read in conjunction with the entire existing body of law." *Kansas City, Mo. v. Federal Pac. Elec. Co.*, 310 F.2d 271, 275 (8th Cir. 1962). Nothing Congress included in CAFA suggests a class action plaintiff is no longer the master of his complaint or is somehow prevented from "suing for less than the jurisdictional amount." *St. Paul Mercury*, 303 U.S. at 294. Thus, "a binding stipulation limiting damages sought to an amount not exceeding $5 million can be used to defeat CAFA jurisdiction." *Rolwing v. Nestle Holding, Inc.*, No. 11-3445 (8th Cir. Feb. 2, 2012).

3. The question is whether *the particular class action proposed by Plaintiff* falls within federal jurisdiction. CAFA recognizes that "claims" of "class

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[2] *See also Iowa City Ry. v. Bacon*, 236 U.S. 305, 308 (1915) (holding that plaintiff could defeat removal by requesting only $1,900 in damages (at a time when the jurisdictional threshold was $2,000) even though plaintiff's loss was $10,000).

members" in a "class action" do not exist in a vacuum. Rather, under CAFA, a "class action" is a "civil action . . . brought by 1 or more representative persons as a class action" who decides on the "definition of the proposed class" and chooses what "claims of the individual class members" to assert. 28 U.S.C. § 1332(d). It is true, of course, that merely filing a proposed class action will not "bind" proposed class members. *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011). However, it is equally true that the question on removal is whether the particular class action ***being proposed by the plaintiff*** falls within federal jurisdiction. "[B]ecause the plaintiff is the 'master of the case' and 'may limit his claims . . . to keep the amount in controversy below the threshold,' the removing party must 'show not only what the stakes of the litigation could be, but also what they are ***given the plaintiff's actual demands***.'" *Morgan*, 471 F.3d at 474 (emphasis supplied), quoting *Brill*, 427 F.3d at 449. Here, "to ensure that any attempt to remove [will be] unsuccessful," Plaintiff filed "a binding stipulation" with the state court complaint binding him to "not seek damages greater than the jurisdictional minimum upon remand." *Bell*, 557 F.3d at 958. Given Plaintiff's "actual demands," it is legally certain that less than $5 million is "in controversy." *See Rolwing*, No. 11-3445.

4. The decision to stipulate to damages of a certain size is not unlike innumerable other decisions class representatives inevitably make as masters of their complaints. Named plaintiffs

bringing putative class actions necessarily "limit" the recovery of their proposed class by choosing which defendants to sue, which causes of action and elements of damages to include, and what kinds of litigation tactics to pursue in discovery, pretrial motions, and beyond. For example, a plaintiff might limit his proposed class to state-law claims though valuable federal claims exist,[3] limit recovery to actual damages by waiving class claims for punitive damages,[4] or limit recovery to minimal statutory, liquidated damages though some proposed class members may have viable claims for more in actual damages.[5]

> Like other plaintiffs, class action plaintiffs should be able to make strategic decisions concerning how to plead a case. Judicial concern about a limitation on the value of claims may be addressed when the question of plaintiff's adequacy as a representative is considered.

Holcombe v. Smithkline Beecham Corp., 272 F. Supp.2d 792, 793 (E.D. Wis. 2003). In fact, plaintiffs can and often do go so far as to enter into a proposed settlement of the claims of proposed class

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[3] *Four Way Plant Farm, Inc. v. National Council on Compensation Ins. (NCCI)*, 894 F. Supp. 1538, 1544 (M.D. Ala. 1995).

[4] *Quebe v. Ford Motor Co.*, 908 F. Supp. 446, 453 (W.D. Tex. 1995).

[5] *Chakejian v. Equifax Information Services LLC*, 256 F.R.D. 492 (E.D. Pa. 2009).

members *prior to the class being certified.*[6] Few things could be construed more clearly as "limiting" the value of a proposed class member's claim than a proposed settlement of that very claim. In sum, plaintiffs proposing class actions can and often must make decisions affecting the ultimate value of the claims of merely "proposed" class members. Importantly, the due process rights of such proposed class members are always protected before any such decisions are considered "binding." In particular, the plaintiff must always demonstrate "adequate representation" of the class throughout the case. Defendant suggests that allowing the stipulation to defeat removal is contrary to due process rights of the proposed class members. Defendant forgets its favorite quote from *Smith*: "Neither a proposed class action nor a rejected class action may bind nonparties." 131 S.Ct. at 2380.

As discussed, plaintiffs proposing class actions often make such "value" – related decisions. Defendant's argument is just a premature challenge to whether Plaintiff is an adequate representative. It is also wrongly premised on the perverse idea that

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[6] *See, gen. Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 618 (1997) ("the 'settlement only" class has become a stock device"). For illustration only, in *Wineland v. Casey's General Stores, Inc.*, 267 F.R.D. 669 (S.D. Iowa 2009), a proposed class action was filed, a proposed settlement of the claims of the proposed class members was agreed to by the named plaintiff, and then the court was asked to certify the class and approve the settlement.

Defendant is the protector of the class, when the argument is being advanced by lawyers zealously advocating the interests of Defendant, ***not the class***. Here, Defendant has conceded the state forum would be in the best interests of the class. (Pet. for Permission to Appeal at 4). In any event, concerns regarding the propriety of the stipulation should, can, and will be addressed at the class certification stage and again if a judgment is considered for approval by the court in Arkansas.[7]

5. The stipulation unequivocally provides that Plaintiff will not *at any time* seek damages or fees sufficient to satisfy CAFA jurisdiction. Doc. 2 at 16. In *Bell*, this Court used the word "seek" and did not mention "accept." *Bell*, 557 F. 3d at 958. The district court properly concluded that "[m]agic words or blood oaths are not required in order to make a sworn stipulation binding." Doc. 13 at 7. "Seeks" is clearly sufficient given Arkansas law because "[a] Declaration . . . is binding on the Plaintiff with respect to the amount in controversy unless the Plaintiff subsequently amends the complaint." Ark. Code Ann. § 16-63-221(b); *see* Doc. 13 at 8-9; *see also Smith v. American Bankers Ins. Co. of Florida*, 2011 WL 6090275, **6-7 (W.D. Ark. Dec. 7, 2011). As applied

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[7] *See, e.g., Tuberville v. New Balance Athletic Shoe, Inc. et al*, 2011 WL 1527716, at **4-5 (W.D. Ark. April 21, 2011); *Murphy v. Reebok Intern., Ltd.*, 2011 WL 1559234, at *3 (E.D. Ark. April 22, 2011); *Holcombe*, 272 F. Supp. 2d at 793; *Four Way Plant Farm*, 894 F. Supp. at 1544.

here, the stipulation obviously prevents Plaintiff from ever amending to "seek" more. *See, e.g., Adams v. Williams*, 2009 WL 1585972, *3 (S.D. Miss. June 4, 2009) (construing similar stipulation as waiving any right to later amend complaint's ad damnum clause).

Unlike *Bell*, this case involves direct statements in a **sworn affidavit**. And, unlike Iowa law considered in *Bell*, Arkansas applies judicial estoppel to prevent a party from taking "a position clearly inconsistent . . . with a position taken **in the same case.**" *Dupwe v. Wallace*, 140 S.W.3d 464, 466 (Ark. 2004) (emphasis supplied).[8] Federal judges sitting in Arkansas agree that Arkansas will apply estoppel in these circumstances.[9] The court's finding that Plaintiff is estopped from recovering more in state court (Doc. 13 at 7) will clearly "travel back with the case."

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[8] "A litigant is not permitted to assume wholly inconsistent positions on the same issue in the same case." *MacSteel Div. of Quanex v. Arkansas Oklahoma Gas Corp.*, 210 S.W.3d 878, 886 (Ark., 2005); *see also National Enterprises, Inc. v. Lake Hamilton Resort, Inc.*, 142 S.W.3d 608 (Ark. 2004); *Parsons Dispatch, Inc. v. John J. Jerue Truck Broker, Inc.*, 199 S.W.3d 686 (Ark. App. 2004).

[9] *See, e.g, Thompson v. Apple, Inc.*, 2011 WL 2671312, at *3 (W.D.Ark. July 8, 2011) (J. P.K. Holmes III); *Murphy*, 2011 WL 1559234 at *2 (J. Marshall); *Tuberville*, 2011 WL 1527716 at *4 ((J. Dawson); *Harris v. Sagamore Ins. Co.*, 2008 WL 4816471,*3 (E.D. Ark. Nov. 3, 2008) (J. Leon Holmes); *see, also, gen., Welbern v. Hunt*, 874 F.2d 532, 534 (8th Cir. 1989) ("For many reasons, district courts are inherently more reliable interpreters of the laws of the states in which they operate than the more removed courts of appeals.").

See gen., Ruhrgas AG v. Marathon Oil Co, 526 U.S. 574, 585-86 (1999).[10]

6. This Court's February 2, 2012 opinion in *Rolwing*, No. 11-3445, confirms the decision of the district court to remand the present case. In *Rolwing*, stipulations defeated removal even though the plaintiff had apparently conceded the class claims were potentially worth more than $13 million and the same attorney had already litigated the same claims for the same class to a final judgment. Here, the court expressly found that Plaintiff's stipulation is in good faith. Doc. 13 at 10. Even using an implausibly high 40% attorney's fee, the total claimed to be in controversy by Defendant in the present case is only $24,000 over $5 million. *Id.* at 5. There has been no "prior litigation" of the claims asserted herein by Plaintiff. Given the law in Arkansas on judicial

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[10] *See also Lippett v. Raymond James Fin. Svcs., Inc.*, 340 F.3d 1033, 1046 (9th Cir. 2003) ("Lippitt's counsel stated that his client would not amend the complaint to add a federal claim upon remand . . . We remand in reliance that Lippitt will adhere to this promis [sic] . . . since judicial estoppel 'bars a party from taking inconsistent positions in the same litigation.'"); *Arnold v. State Farm Fire and Cas. Co.*, 277 F.3d 772, 775 n.3 (5th Cir. 2001) ("We agree with the judge's view that the affidavits preclude Arnold and Vining from seeking damages in excess of that amount in state courts either as a judicial admission, judicial estoppel or a matter of preclusion"); *Tinkham v. Jenny Craig, Inc.*, 699 N.E.2d 1255, 1260 (Mass. App. 1998) (applying estoppel to prevent plaintiffs from seeking damages above $50,000 because, in order to obtain remand, plaintiff had made "commitment" in federal court not to seek more).

estoppel as well as Ark. Code Ann. § 16-63-221 which limits Plaintiff to his declared maximum in controversy, the stipulation is clearly binding.

7. The Fifth, Sixth and Seventh Circuits have NOT held that a plaintiff may not defeat CAFA jurisdiction by sworn stipulation. ***None*** of the cases that Defendant cites from those circuits even involve a sworn stipulation limiting the recovery of the proposed class. *Smith v. Nationwide Property and Cas. Ins. Co.*, 505 F.3d 401 (6th Cir. 2007) considers only allegations in a complaint. If anything, the case supports the decision here below. *See id.* at 408 (punitive damages not in controversy because not alleged). Further, the Sixth Circuit has since stated "plaintiffs can avoid removal under CAFA by limiting the damages they seek." *Freeman*, 551 F.3d at 409. In *Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827 (7th Cr. [sic] 2011), the court took pains to emphasize the plaintiff could have "prevent[ed] removal by filing a binding stipulation" but "did not file any kind of limiting document with its complaint." *Id.* at 830-31. In *Pfizer, Inc. v. Lott*, 417 F.3d 725 (7th Cir. 2005), the stipulation did not address damages sought on behalf of the class.

The unpublished *Ditcharo v. United Parcel Service, Inc.*, 376 Fed. Appx. 432 (5th Cir. 2010), is not precedent. In any event, the plaintiffs stipulated to limit their own damages but did not even attempt to limit the recovery of other class members. *Ditcharo* at *437. The *Ditcharo* stipulation is attached as *Ex. 1.* As the stipulations did not even mention damages

class members might seek, the stipulations obviously "did not provide [plaintiffs] with the authority to deny other members of their putative class action the right to seek an award greater than $75,000." *Id.* at *437. In *Manguno v. Prudential Prop. and Cas. Ins. Co.*, 276 F.3d 720 (5th Cir. 2002), there was no sworn stipulation, but the court did note the plaintiff could have defeated removal "by filing a binding stipulation." *Id.* at 724.

CONCLUSION AND PRAYER

The district court's decision in the present case is not contrary to any decision by another circuit, this Court, or the Supreme Court. Instead, the decision followed the well-established rule that, as master of his case, Plaintiff could and did defeat removal by filing a stipulation that is legally binding and made in good faith to seek less than the federal jurisdictional minimum. The petition for rehearing should be denied.

Respectfully submitted,

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[Certificate Of Service Omitted]

[Exhibits Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

GREG KNOWLES, Individually
and as Class Representative on Behalf
of all Similarly Situated Persons
Within the State of Arkansas — PLAINTIFF

v. — No. 11-4044

THE STANDARD FIRE
INSURANCE COMPANY — DEFENDANT

NOTICE OF REMOVAL

(Filed May 18, 2011)

Defendant The Standard Fire Insurance Company ("Standard Fire"), pursuant to 28 U.S.C. §§ 1441 and 1446, hereby removes to this Court the action captioned, *Greg Knowles v. The Standard Fire Insurance Company,* Case No. CV-2011-0239-3 on the docket of the Circuit Court of Miller County, Arkansas.

In support of its Notice of Removal, Standard Fire respectfully alleges:

1. On April 13, 2011, Plaintiff Greg Knowles commenced the captioned action by filing a complaint in the Circuit Court of Miller County, Arkansas. A copy of all process, pleadings, and orders served upon Standard Fire in the state court action is attached as *Exhibit A* hereto.

2. The Summons and the Complaint were served by certified mail on the Corporation Service Company as agent for service of process for Standard Fire on April 18, 2011. This Notice of Removal is filed within 30 days of service of process and is therefore timely under 28 U.S.C. § 1446(b).

3. This Court has jurisdiction under the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d), because this lawsuit is a putative class action in which there is minimal diversity of citizenship and the amount in controversy exceeds $5 million, as explained more fully below.

PARTIES

4. Plaintiff Greg Knowles is an individual domiciled in Miller County, Arkansas. (Complaint, ¶ 5.)

5. Defendant Standard Fire is a corporation organized under the laws of Connecticut with its principal place of business in Connecticut. (*Id.*, ¶ 7.)

PLAINTIFF'S ALLEGATIONS[1]

6. Plaintiff filed this case as a putative class action under Arkansas Rule of Civil Procedure 23. (Complaint, ¶ 8.) Plaintiff alleges that Standard Fire insured his property and that he made a claim with Standard Fire for property damage occurring on or about March 10, 2010. (*Id.*, ¶¶ 15-17.) Plaintiff alleges that Standard Fire improperly failed to include fees for a general contractor's services, known as general contractor overhead and profit ("GCOP"), in payments made to Plaintiff. (*Id.*, ¶¶ 20-23.) Plaintiff further alleges that Standard Fire "actively concealed information about entitlement to GCOP." (*Id.*, ¶ 33.) Plaintiff claims that "[t]hese underpayments . . . have generated extensive profits for Defendant [and] Defendant's failure to compensate their [sic] insureds for benefits to which they are entitled constitutes breach of contract." (*Id.*, ¶ 1.)

7. Plaintiff purports to bring this lawsuit on behalf of a putative class proposed to be defined as "[a]ny and all customers of The Standard Fire Insurance Company who are residents of Arkansas, who received payments under a homeowners insurance policy issued by The Standard Fire Insurance Company for physical loss or damage to their dwelling,

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[1] Standard Fire does not admit the underlying facts as alleged by Plaintiff or as summarized herein. Standard Fire expressly denies any liability to Plaintiff or the putative class. Similarly, Standard Fire reserves its rights to challenge the legal sufficiency of the allegations in the Complaint.

such dwelling located in Arkansas, at any time between January 1, 2009 and December 31, 2010."[2] (*Id.*, ¶ 25.)

8. The Complaint pleads a single cause of action for breach of contract. (*Id.*, ¶¶ 39-45.) The sole alleged breach of contract is that "Defendant materially breached the terms of their [sic] standardized policy

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[2] The proposed class definition further provides that "Excluded from the Class are: (1) Defendant and all directors, officers, employees, partners, principals, shareholders and agents of Defendant; (2) Persons or entities who timely opt-out of this proceeding using the correct protocol for 'opting-out' that will be formally established by this Court; (3) any and all Federal, State and/or Local Governments, including, but not limited to, their Departments, Agencies, Divisions, Bureaus, Boards, Sections, Groups, Councils and/or any other subdivision, and any claim that such governmental entities may have directly or indirectly; (4) Any currently-sitting Arkansas State Court Judge or Justice, and the current spouse and all other persons within the third-degree of consanguinity to such judge/justice; (5) Any claim which resulted in the payment of policy limits or more by Defendant; and (6) Plaintiff s Counsel." (Complaint, ¶ 25.) In analyzing the claims of putative class members for purposes of this Notice of Removal, Standard Fire has used reasonable measures to attempt to identify any claims attributable to any persons or entities excluded by Plaintiff from the proposed class, including attempting to identify and remove from the analysis any claims of persons described in categories (1), (4), (5) and (6) above (except for non-spouses falling within the third degree of consanguinity to currently sitting Arkansas state court judges or justices, whose identity is not known to Standard Fire). With respect to category (3), insofar as Standard Fire is aware none of these claims are attributable to governmental entities.

contracts with Plaintiff and the Class by failing to include payments for GCOP." (*Id.*, ¶ 44.)

9. The Complaint also contains a series of allegations of "Fraudulent Concealment." (*See id.*, ¶¶ 33-37.) These allegations assert that Standard Fire failed to disclose to Plaintiff and the putative class information regarding entitlement to GCOP and that "Defendant's fraudulent concealment tolls the running of any applicable statute of limitations." (*Id.*, ¶ 37.) The Complaint further alleges that "Plaintiff is not asserting a cause of action or seeking damages for fraud, but is pleading fraudulent concealment for the sole purpose of tolling the statute of limitations." (*Id.*)

10. The Complaint seeks, on behalf of Plaintiff and the putative class, damages for breach of contract, attorneys' fees, interest and costs. (*Id.* at 10.)

JURISDICTION UNDER CAFA

11. Congress intended CAFA "to open the federal courts to corporate defendants out of concern that the national economy risked damage from a proliferation of meritless class action suits." *Bell v. Hershey Co.*, 557 F.3d 953, 957 (8th Cir. 2009). Removal is proper under CAFA, 28 U.S.C. § 1332(d)(2), where, as here, a putative class action involves minimal diversity of citizenship and an aggregate amount in controversy exceeding $5 million.

12. CAFA applies "to any class action before or after the entry of a class certification order by the

court with respect to that action." 28 U.S.C. § 1332(d)(8). This case is a putative "class action" under CAFA because it was brought under a state statute or rule, namely Ark. R. Civ. P. 23, authorizing an action to be brought by one or more representative persons as a class action. *See* 28 U.S.C. § 1332(d)(1)(B); Complaint, ¶¶ 8, 31.

Minimal Diversity

13. This case satisfies the minimal diversity requirement of CAFA because at least one member of the putative class is a citizen of a state different from at least one defendant. *See* 28 U.S.C. § 1332(d)(2)(A). The named Plaintiff is a citizen of Arkansas. (Complaint, ¶ 6.) Standard Fire is not a citizen of Arkansas. (*Id.*, ¶ 7.)

Amount in Controversy

14. As the Eighth Circuit has explained, "a party seeking to remove under CAFA must establish the amount in controversy by a preponderance of the evidence regardless of whether the complaint alleges an amount below the jurisdictional minimum." *Bell*, 557 F.3d at 958. In analyzing the amount in controversy, the question is "not whether the damages *are* greater than the requisite amount, but whether a fact finder *might* legally conclude that they are. . . ." *Id.* at 959 (internal quotations and citation omitted; emphasis in original). If the defendant "prove[s] by a preponderance of the evidence that the amount in

controversy is satisfied, remand is only appropriate if [the plaintiff] can establish that it is legally impossible to recover in excess of the jurisdictional minimum." *Id.* at 959. Any allegation by the plaintiff claiming a specific amount is immaterial where there is "no evidence that upon remand [the state] court would prohibit recovery in excess of the amount alleged as a matter of law." *Id.*

15. This case satisfies CAFA's amount in controversy requirement because the matter in controversy exceeds the sum of $5 million, exclusive of interest and costs. 28 U.S.C. § 1332(d)(2). CAFA provides that "the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs." *Id.*, § 1332(d)(6). In determining the amount in controversy, this Court properly considers all applicable damages, including statutory penalties and attorneys' fees. *See, e.g., Powell v. State Farm Fire & Cas. Co.*, 2010 U.S. Dist. LEXIS 6796, at *2-3 (W.D. Ark. Jan. 27, 2010) (Barnes, J.) (holding that, in case involving insurance claim for property damage, amount in controversy included potential statutory penalty under Ark. Code Ann. § 23-79-208 of 12% of amount sought under insurance policy, plus attorneys' fees).

16. Plaintiff alleges that Standard Fire breached the insurance contracts "by failing to include payments for GCOP." (Complaint, ¶ 44.) Plaintiff alleges that "[t]he percentage assessed for overhead and profit within the construction and

insurance industries is 20% of the estimated job." (*Id.*, ¶ 3.) As an example, Plaintiff explains that "where the repair costs on a job equal $10,000, the GCOP payment will be an additional $2,000." (*Id.*) A reasonable estimate of the "repair costs" attributable to the homeowners' insurance claims of Plaintiff and the putative class members can be made by ascertaining the total amount of loss that was determined to be covered under their policies with respect to structural losses. This amount consists of the sum of the benefits paid on such claims and the deductibles associated with those claims. For example, if the repair costs on a particular claim were determined to be $10,000, and the amount paid was $9,000 after applying a deductible of $1,000, then if GCOP were payable on the claim this would add another $2,000 in benefits (i.e., 20% of the $10,000). Thus, a portion of the amount in controversy can be reasonably estimated to constitute 20% of the aggregate total of prior payments and deductibles.

17. A review of data maintained regarding payments and deductibles on those claims falling within the definition of the proposed class reflects that the aggregate total of payments for structural losses and deductibles is $15,274,806. Twenty percent of that amount is $3,054,961.

18. If Plaintiff and the putative class succeed in establishing breaches of contract, they could potentially be entitled to an additional 12% penalty, plus attorneys' fees. Arkansas law provides, as a general rule, that "[i]n all cases in which loss occurs and the

. . . property . . . insurance company . . . shall fail to pay the losses within the time specified in the policy after demand is made, the [company] shall be liable to pay the holder of the policy or his or her assigns, in addition to the amount of the loss, twelve percent (12%) damages upon the amount of the loss, together with all reasonable attorney's fees for the prosecution and collection of the loss." Ark. Code Ann. § 23-79-208(a)(1).[3] This Court considers such damages and attorneys' fees as part of the amount in controversy for purposes of federal jurisdiction. *See Powell*, 2010 U.S. Dist. LEXIS 6796, at *2-3.

19. Here, an additional 12% statutory penalty added to the estimated amount in controversy set forth in Paragraph 17 constitutes an additional $366,595, for a potential total compensatory damages award of $3,421,556.

20. With respect to attorneys' fees, in cases brought against insurance companies seeking to recover under insurance policies, attorneys' fees are potentially available under Ark. Code Ann. § 23-79-208(a)(1). Arkansas courts have held that attorneys' fees of "forty percent of the amount recovered by

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[3] There are certain exceptions to this general rule where the amount recovered is more than 20% below the amount demanded (assuming there is a specific amount in demand). *See* Ark. Code Ann. § 23-79-208(d). For purposes of analyzing the amount in controversy, however, it must be presumed that Plaintiff and the putative class can prove the facts alleged and recover on the claims alleged.

[plaintiff] under the policies, plus penalty and prejudgment interest," are reasonable under that statute. *Capital Life & Accident Ins. Co. v. Phelps,* 76 Ark. App. 428, 434-35, 66 S.W.3d 678, 682-83 (2002). Here, attorneys' fees calculated, as in *Phelps*, as 40% of breach of contract damages plus the penalty and prejudgment interest,[4] would be an additional amount in excess of $1,602,594, for a total amount in controversy exceeding $5,024,150. This calculation is more conservative than the actual attorneys' fees awarded in *Phelps,* which were 58% of the damages for breach of contract (attorneys' fees of $30,589.86 on a breach of contract award of $52,610.07). *See Phelps*, 76 Ark. App. at 434-35, 66 S.W.3d at 682-83. Here, an attorneys' fees award measured as 58% of the potential damages for breach of contract would be $1,771,877, for a total amount in controversy of $5,193,433.

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[4] In this calculation of attorneys' fees, prejudgment interest is calculated at the maximum rate of 5% above the federal discount rate (*see* Ark. Const. art. 19, § 13), and assumes that this case could reach a final judgment within two years of the date of filing. This calculation of the approximate amount of interest was done with interest beginning to accrue on the additional amounts allegedly owed on claim payments during a given year only after the end of that year. Interest would actually begin to accrue within 60 days after Standard Fire owed a payment. An interest calculation running from these actual dates would be higher, and the amount of attorneys fees set forth in this Notice (i.e., $1,602,594) would therefore actually be higher if interest were calculated with more precision.

21. Because this case is a putative class action, the attorneys' fees awarded by the Miller County Circuit Court potentially could exceed the amounts set forth in Paragraph 20. In other class actions involving the exact same issue regarding alleged failure to pay GCOP and involving the very same lawyers who represent Plaintiff here, tens of millions of dollars have been awarded in attorneys' fees by the Miller County Circuit Court. These fees were awarded where the case settled *prior* to trial, and *prior* to class certification. *See, e.g., Beazley v. Hartford Insurance Company of the Midwest,* Case No. CV-2005-58-1 (Ark. Cir. Ct., Miller County); *Alexander v. Nationwide Mutual Insurance Company,* Case No. CV-2009-120-3 (Ark. Cir. Ct., Miller County); *Chivers v. State Farm Fire & Casualty Company,* Case No. CV-2010-251-3 (Ark. Cir. Ct., Miller County); *Feely v. Allstate County Mutual Insurance Company,* Case No. CV-2004-294-3A (Ark. Cir. Ct., Miller County); *see also Johnson v. State Auto Mutual Insurance Company,* CV-2010-114-3 (Ark. Cir. Ct., Miller County).

22. Moreover, based on the allegations of fraudulent concealment (Complaint, ¶¶ 33-37), this Court should conclude that Plaintiff intends to pursue certification of a class of policyholders for a class period longer than the January 1, 2009 to December 31, 2010 period alleged in Paragraph 25 of the Complaint. Plaintiff alleges that he "is pleading fraudulent concealment for the sole purpose of tolling the statute of limitations." (Complaint, ¶ 37.) The statute of limitations for breach of contract in Arkansas is

five years.[5] *See* Ark. Code Ann. § 16-56-111; *Shelter Mut. Ins. Co. v. Nash,* 357 Ark. 581, 184 S.W.3d 425 (2004). Thus, when the Complaint is fairly read as a whole, Plaintiff must be seeking to certify a class for a time period *longer* than the five-year statute of limitations for breach of contract. Otherwise, the allegations of fraudulent concealment in Paragraphs 33 through 37 of the Complaint would serve no purpose.

23. Using the most conservative assumption that, when the fraudulent concealment allegations are given effect, the class period encompasses, at a minimum, five years and one day measured retrospectively from the filing of the Complaint on April 13, 2011 (i.e., April 12, 2006, through April 13, 2011), the amount in controversy for breach of contract, using the same method of analysis set forth above, is $7,109,753. When an additional penalty of 12% and attorneys' fees of 40% are added to that amount, the total amount in controversy exceeds $11 million.

Fraudulent Framing of Class Definition

24. Alternatively, the Court should bar Plaintiff from fraudulent framing his class definition so that it encompasses an arbitrary period shorter than the applicable statute of limitations. Federal courts have

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[5] Many of Standard Fire's homeowners' insurance policies issued in Arkansas contain a provision requiring that suit be brought within five years from the date of loss.

long recognized the doctrine of fraudulent joinder, under which a plaintiff cannot prevent removal "by fraudulently joining a defendant who has 'no real connection with the controversy.'" *Knudson v. Sys. Painters, Inc.*, 634 F.3d 968, 976 (8th Cir. 2011). "The purpose of this exception is to strike a balance between the plaintiff's right to select a particular forum and the defendant's right to remove the case to federal court." *Id.* Similarly, under CAFA, this Court should not permit the newly emerging tactic used by plaintiffs' attorneys of selecting an arbitrary class period that is shorter than the applicable statute of limitations for the sole purpose of attempting to avoid federal jurisdiction. This tactic constitutes a fraudulent manipulation of the provisions of CAFA and contravenes the purpose and intent of CAFA. "CAFA was clearly designed to prevent plaintiffs from artificially structuring their suits to avoid federal jurisdiction." *Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 407 (6th Cir. 2008). Indeed, if courts allow this tactic, a plaintiffs' attorney can make any class action non-removable simply by pleading a class period that is short enough that the amount in controversy for that arbitrarily shortened class period falls below $5 million. Plaintiffs' attorneys then could bring multiple class actions with class periods encompassing short periods of time, but as long as they file the cases separately and the cases are not pending simultaneously (which would allow removal under *Freeman*), a defendant could not remove any of the cases to federal court. Such a rule of law would completely defeat Congress's intent in enacting

CAFA. Accordingly, this Court should bar the fraudulent framing of a class definition and prevent Plaintiff from arbitrarily limiting the time period for his proposed class action to a period shorter than the applicable statute of limitations.[6]

25. Here, based on Plaintiff's fraudulent framing of their class definition to an arbitrary two-year period, where the applicable statute of limitations is five years, this Court should calculate the amount in controversy based on a five-year period. Using a five-year period, the amount in controversy far exceeds $5 million, based on the analysis set forth in Paragraph 23 above.

26. Moreover, the Court should not allow an arbitrary cutoff of the class period at December 31, 2010, where, if the class period ended when this suit was filed, that would add an additional amount in excess of $163,683 to the amount in controversy with respect to Plaintiffs' two-year period.

Invalidity of Plaintiff's Purported Stipulation

27. Plaintiff purports to stipulate that he will not "seek damages for myself or any other individual

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[6] If Plaintiff had alleged in good faith a valid basis for his January 1, 2009 to December 31, 2010 class period, such as if he alleged that Standard Fire commenced the allegedly improper practice on January 1, 2009, and ended it on December 31, 2010, that might not be fraudulent framing of a class definition. But Plaintiff makes no such allegation.

class member in excess of $75,000 (inclusive of costs and attorneys' fees) or seek damages for the class *as alleged in the complaint to which this stipulation is attached* in excess of $5,000,000 in the aggregate (inclusive of costs and attorneys' fees)." (Complaint, "Sworn and Binding Stipulation," attached as Ex. A thereto (emphasis added); *see also* Complaint, ¶ 11 and "Prayer for Relief.") However, Plaintiff's putative stipulation does not limit Plaintiff's or the putative class's recovery for several reasons. First, Plaintiff's stipulation does not bind either the *class* or *class counsel*. Only Plaintiff himself signed the stipulation, and his replacement as putative class representative would free the class and class counsel to pursue *any* amount of damages. (Complaint Ex. A.) Moreover, under the express terms of the stipulation itself, it applies only "for the class as alleged in the complaint to which this stipulation is attached" and would not apply to an amended complaint that modifies the proposed class definition (and also might not apply if the state court on its own certified a class defined differently from the proposed class). Second, putative class counsel (who has not even yet been appointed as such) did *not* sign the stipulation, and thus the stipulation is not necessarily binding with respect to whether class counsel could obtain attorneys' fees that would bring the amount in controversy above $5 million. Third, Plaintiff *cannot* waive the rights of the putative class members to seek full recovery simply because he would prefer to litigate in state court. *See Back Doctors Ltd. v. Metropolitan Prop. & Cas. Ins. Co.*, No. 11-8003, ___ F.3d ___, 2011 WL 1206184, at

*3 (7th Cir. Apr. 1, 2011) ("[Plaintiff] has a fiduciary duty to its fellow class members. A representative can't throw away what could be a major component of the class's recovery. . . . What [Plaintiff] is willing to accept thus does not bind the class and therefore does not ensure that the stakes fall under $5 million."); *Bass v. Carmax Auto Superstores, Inc.*, No. 07-0883, 2008 U.S. Dist. LEXIS 11180, at *6 (W.D. Mo. Feb. 14, 2008) (explaining, in analyzing amount in controversy under CAFA, that "Plaintiff has no right to limit or compromise the recovery of the class without Court approval, particularly before she has even been approved as a representative for the class"); *see also Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 724 (5th Cir. 2002) ("it is improbable that [the named plaintiff] can ethically unilaterally waive the rights of the putative class members to attorney's fees without their authorization").

28. Further, and contrary to Plaintiff's assertion in Paragraph 11 of the Complaint, Plaintiff's stipulation is *not* necessarily binding even upon Plaintiff himself. Under a new Arkansas statute enacted shortly before Plaintiff filed this lawsuit, Plaintiff may simply file an amended complaint to negate the effect of the stipulation. Ark. Code. Ann § 16-63-221(b) provides that "[a] declaration . . . is binding on the plaintiff with respect to the amount in controversy *unless the plaintiff subsequently amends the complaint* to pray for damages in an amount that exceeds the jurisdictional limits of the court, at which time the amendment is governed by the Arkansas

Rules of Civil Procedure." Ark. Code § 16-63-221(b) (cited in the Complaint at ¶ 11) (emphasis added). It appears that Plaintiff intends to take advantage of this new loophole in Arkansas law, given the text of his stipulation, which provides that it applies only to "the class as alleged in the complaint to which this stipulation is attached. . . ." (Complaint, Exhibit A.)[7]

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[7] If Plaintiff seeks remand, he likely will rely upon *dicta* in *Bell v. Hershey Co.*, 557 F.3d 953 (8th Cir. 2009), and recent unpublished decisions in *Tuberville v. New Balance Athletic Shoe, Inc.*, No. 1:11-cv-01016, slip op. (W.D. Ark. Apr. 21, 2011) (Dawson, J.) and *Murphy v. Reebok Int'l, Ltd.*, Case No. 4:11-cv-214-DPM, slip op. (E.D. Ark. Apr. 22, 2011) (Marshall, J.). None of these decisions are on point here. In *Bell*, the court commented, in *dicta*, that a binding stipulation might bar removal, citing pre-CAFA jurisprudence on stipulations that the amount in controversy is below $75,000. *See Bell*, 557 F.3d at 958. But *Bell* did not address fraudulent framing of a class definition or what a binding stipulation must contain in order for it to be effective in barring removal. *Tuberville* and *Murphy* are likewise inapposite for several reasons. First, the stipulations in those cases were substantially broader than in the case at bar because: (1) putative class *counsel* signed a binding stipulation that they would not seek or accept an award of attorneys' fees that would allow the total amount in controversy (including attorneys' fees) to go above $5 million; (2) unlike here, the stipulations were *not*, by their own terms, inapplicable to an amended complaint; and (3) neither case involved fraudulent framing of a class definition. *See Tuberville*, slip op. at 3; *Murphy*, slip op. at Appendix A. Second, both opinions were based on a premise that Arkansas state law would *bar* the plaintiff from later seeking more than $5 million. *See Tuberville*, slip op. at 9; *Murphy*, slip op. at 4-5. That is no longer the law of Arkansas – as amended effective March 18, 2011, Ark. Code § 16-63-221(b) now expressly provides that a stipulation regarding the amount in controversy is not binding if a complaint is amended. Third, in both *Tuberville*

(Continued on following page)

29. In addition, when Plaintiff served the Complaint, he also served a First Request For Admissions and a First Set of Interrogatories over 100 pages in length.[8] These requests seek a vast amount of information regarding Standard Fire's policies and practices with respect to GCOP and with respect to homeowners' insurance claims in general. The vast majority of that material would not be necessary or even useful for purposes of proving a simple breach of contract. This discovery is clearly intended and directed towards establishing claims that go beyond a simple breach of contract.

Exceptions to CAFA Jurisdiction

30. None of the exceptions to CAFA jurisdiction applies. Standard Fire is not a citizen of the state in which the action was filed, i.e., Arkansas. Accordingly, Sections 1332(d)(3) and (d)(4) do not apply. Section 1332(d)(5)(A) does not apply because Standard Fire, the only defendant, is not a State, State official or other governmental entity against which this Court may be foreclosed from ordering relief. Section

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and *Murphy* the courts did not even need to reach the enforceability of the stipulation because the courts concluded that the defendants failed to demonstrate adequately that the actual amount in controversy exceeded $5 million. *See Tuberville,* slip op. at 11, *Murphy,* slip op. at 6.

[8] The discovery requests are not attached hereto because of their extraordinary length. If Plaintiff files a motion to remand, Standard Fire will submit a copy of the discovery requests with its response.

1332(d)(5)(B) does not apply because the number of members of all proposed plaintiff classes in the aggregate is not less than 100. Section 1332(d)(9) does not apply because Plaintiff's claims do not involve securities or the internal affairs or governance of a corporation or other form of business enterprise.

31. Accordingly, this Court has original jurisdiction under CAFA.

REMOVAL PROCEDURE

32. A copy of this notice of removal is being served upon all known counsel of record, along with a copy of the Notice to the Clerk of Court for the Circuit Court of Miller County, Arkansas, which is being filed simultaneously in that court.

33. Copies of all process, pleadings, and orders served upon Standard Fire in the state court action are attached as *Exhibit A* hereto.

WHEREFORE, Standard Fire hereby provides notice that this action is duly removed to this Court.

MITCHELL, WLLIAMS [sic], SELIG, GATES & WOODYARD, P.L.L.C.
425 West Capitol Avenue,
Suite 1800
Little Rock, Arkansas 72201
Phone: (501) 688-8869
Facsimile: (501) 918-7869
lpruitt@mwlaw.com

By: /s/ Lyn P. Pruitt
Lyn P. Pruitt, Ark. Bar No. 84121

Attorneys for Defendant
The Standard Fire
Insurance Company

[Certificate Of Service Omitted In Printing]

EXHIBIT A

[Notice Of Service Of Process
Omitted In Printing]

[Summons Omitted In Printing]

IN THE CIRCUIT COURT OF
MILLER COUNTY, ARKANSAS

GREG KNOWLES, Individually and as Class Representative on Behalf of all Similarly Situated Persons Within the State of Arkansas,	§	
PLAINTIFF	§	CV-2011-0239-3
	§	CLASS ACTION
vs.	§	
THE STANDARD FIRE INSURANCE COMPANY,	§	
DEFENDANT	§	

PLAINTIFF'S CLASS ACTION COMPLAINT

(Filed Apr. 13, 2011)

COMES NOW Plaintiff, Greg Knowles, individually and as class representative on behalf of all similarly situated persons within the State of Arkansas, and submits the following Complaint against Defendant, The Standard Fire Insurance Company.

INTRODUCTION AND NATURE OF CASE

1. For years, Defendant has improperly profited at the expense of its customers by wrongfully underpaying claims for loss or damage to real property under homeowners insurance policies. These underpayments, in the form of failing to pay general contractors' overhead and profit ("GCOP"), have generated extensive profits for Defendant. Although an insurance company has the right to make a profit, it cannot do so to the detriment of its customers. Defendant's failure to compensate their insureds for benefits to which they are entitled constitutes breach of contract.

2. GCOP is simply the fee paid for the services of a general contractor. GCOP is owed by Defendant when certain circumstances arise under a homeowner's loss. Specifically, when it is reasonably likely an insured will incur the costs associated with retaining the services of a general contractor to repair or replace damaged property, GCOP is a necessary element of compensation owed to the customers. It is a paid-for benefit to the customer.

3. General contractors customarily add a percentage to the total estimate for a job to cover their

fee (overhead and profit). The percentage assessed for overhead and profit within the construction and insurance industries is 20% of the estimated job. This payment enables the customer to obtain the services of a general contractor to assist with the various matters involved in a property loss. When owed, payment for GCOP should be 20% of the amount paid by Defendant to complete repairs to the damaged property. Thus, where the repair costs on a job equal $10,000, the GCOP payment will be an additional $2,000.

4. Defendant provides its customers nothing explaining entitlement to GCOP. Thus, the customer is never made aware of his/her possible entitlement to such benefits. Without an allowance for GCOP, the customer must either: a) pay the general contractor out of his/her own pocket; b) go without the services of a general contractor; or c) do the general contracting work himself/herself for free. As long as the Defendant can avoid making this additional 20% payment, it has no concern over which of these options is chosen by their customers. This case presents the Court with an opportunity to ensure that not only Plaintiff, but all similarly situated insurance customers within the State of Arkansas, are fully compensated for their property losses.

5. As a result of Defendant's actions, Plaintiff and the Class were damaged because they received payments from Defendant that were less than they were entitled to for their homeowners' losses.

PARTIES

6. Greg Knowles ("Plaintiff") is a citizen of the State of Arkansas and a resident of Miller County, Arkansas, and was a resident of Miller County at all times relevant to this Complaint. The property insured by Defendant and at issue in this matter is located in Miller County, Arkansas.

7. Defendant, The Standard Fire Insurance Company, is a foreign insurance company, incorporated under the laws of the State of Connecticut with its principal place of business in Connecticut, subject to personal jurisdiction in Arkansas.

JURISDICTION AND VENUE

8. This is a class action lawsuit seeking money damages pursuant to Arkansas Rule of Civil Procedure 23. Plaintiff files this lawsuit for the purpose of certifying a class of Arkansas-only residents pursuant to A.R.C.P. 23.

9. Defendant is subject to personal jurisdiction in the state of Arkansas pursuant to Arkansas Code Annotated Section 16-4-101 because of (a) its systematic and continuous contacts with the state of Arkansas; (b) the systematic and continuous contacts of its agents and/or representatives with the state of Arkansas; (c) the systematic and continuous contacts of its parent, subsidiary and affiliate entities with the state of Arkansas; and/or (d) their systematic underpayment of GCOP, which affects Arkansas consumers.

Defendant is amenable to service under the Arkansas long-arm statute and the exercise of jurisdiction over it does not offend traditional notions of fair play and substantial justice.

10. Defendant has purposefully availed itself of the privilege of conducting activities within Arkansas, thus invoking the benefits and protections of its laws. Defendant nor its agents or subsidiaries have or had customers residing in Arkansas; have or had claims arising from within Arkansas or involving Arkansas residents; have or had agents in Arkansas; have advertised in Arkansas; have been subject to or defended lawsuits in Arkansas; and/or affiliated itself with persons operating and/or conducting business in Arkansas. Further, it was reasonably likely that Defendant could be hailed [sic] into court in Arkansas based on its systematic underpayment of GCOP which Defendant knew would directly affect Arkansas residents. These actions by the Defendant constitute sufficient minimum contacts with Arkansas to warrant this Court's exercise of jurisdiction over it.

11. This Court has subject matter jurisdiction over this matter because the amount in controversy exceeds the minimum jurisdictional limits of the Court. Defendant is not an Arkansas citizen for purposes of a federal court diversity analysis. However, neither Plaintiff's nor any individual Class Member's claim is equal to or greater than seventy-five thousand dollars ($75,000), inclusive of costs and attorneys fees. Plaintiff expressly stipulates to seek less than $75,000 total recovery, inclusive of costs and

attorneys fees, individually or on behalf of any Class Member. (See Sworn and Binding Declaration attached hereto as Exhibit "A"). Moreover, the total aggregate damages of the Plaintiff and all Class Members, inclusive of costs and attorneys' fees, are less than five million dollars ($5,000,000), and the Plaintiff and Class stipulate they will seek to recover total aggregate damages of less than five million dollars ($5,000,000). (See Sworn and Binding Declaration, attached hereto as Exhibit "A"). Pursuant to Section 16-63-221 of the Arkansas Code, this declaration is binding on Plaintiff for purposes of establishing the amount in controversy. As such, there is neither diversity nor Class Action Fairness Act ("CAFA") jurisdiction for this claim in federal court. Pursuant to Arkansas Rule of Civil Procedure 8(a), this pleading demands unliquidated damages. Accordingly, it is intended, and shall by rule be interpreted, to limit recovery to an amount less than that required for diversity jurisdiction in federal court. Plaintiff makes no claim for declaratory on [sic] injunctive relief. Although asserting no cause of action that would support a punitive damage award, Plaintiff specifically disclaims any actual or potential entitlement to punitive damages and stipulates that he will not seek punitive damages in this action.

12. Defendant is properly joined pursuant to Arkansas Rules of Civil Procedure 23 and 20(a). Rule 23(a) provides that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all . . . " Plaintiff is a member of the

proposed class, as defined herein, because he was a customer of The Standard Fire Insurance Company, who received payments, directly or indirectly, from The Standard Fire Insurance Company for physical loss or damage to his dwelling under his homeowners insurance policy, such dwelling located in the State of Arkansas, at any time between January 1, 2009 through December 31, 2010. Therefore, Plaintiff is an appropriate representative and brings this lawsuit on behalf of all class members under Rule 23.

13. Further, Defendant is properly joined pursuant to Rule 20(a), *Permissive Joinder,* which provides:

> All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more

> defendants according to their respective liabilities.

Defendant is properly joined pursuant to Arkansas Rule of Civil Procedure 20(a) because this lawsuit arises from a series of transactions and occurrences related to underpayment of GCOP in connection with Plaintiff's claim for physical loss or damage to his dwelling and multiple common questions of law or fact exist, as detailed herein. Plaintiff and all Class Members seek the same relief against Defendant related to Defendant's underpayment of GCOP.

14. Plaintiff incorporates by reference any and all facts alleged in this Complaint for purposes of establishing venue in Miller County, Arkansas. Venue for this proposed Rule 23 class action is proper in Miller County, Arkansas. First, venue is proper in Miller County, Arkansas, pursuant to Arkansas Code Annotated Section 16-55-213. This is a class action. Pursuant to section 16-55-213, venue is proper in a class action in the county of residence of any properly joined named class representative. Plaintiff is undisputedly a citizen of the State of Arkansas and resident of Miller County, Arkansas. Plaintiff was a resident of Miller County, Arkansas at the time his dwelling was damaged, at the time his claim was adjusted, at the time payment was made for loss or damage to his dwelling, and at the time the lawsuit was filed. Therefore, venue is proper in Miller County, Arkansas pursuant to Section 16-55-213. Because of the clear and unambiguous operation of Section 16-55-213 in the context of a proposed class action,

venue is proper as to Plaintiff and Defendant in Miller County, Arkansas due to the residency of Plaintiff in Miller County, Arkansas.

FACTUAL BACKGROUND

15. Plaintiff is a customer of Defendant and maintained a homeowners insurance policy with Defendant at all times relevant to this matter. At all times mentioned herein, Defendant owed a fiduciary duty and/or had a special relationship with Plaintiff and the Class.

16. At all times mentioned herein, Defendant was obligated to make payments to Plaintiff under his homeowners insurance policy for loss or damage to his residence, home, house, dwelling and other structures (collectively "dwelling") occasioned by certain events or occurrences.

17. Plaintiff's dwelling (which is located in Miller County, Arkansas) sustained physical loss and damage as the result of hail damage that occurred on or about March 10, 2010 that triggered Defendant's obligation to pay Plaintiff for all loss and damages occasioned thereby.

18. Thereafter, Plaintiff properly requested payment from Defendant for the loss and damage to his dwelling.

19. Defendant confirmed that Plaintiff's dwelling had in fact sustained loss and damage and that

Defendant had an obligation and duty to pay Plaintiff for all damages to Plaintiff's dwelling.

20. Although Plaintiff fulfilled any and all obligations or promises imposed upon him, Defendant failed to properly pay Plaintiff for the loss to his dwelling. Specifically, Defendant failed to pay Plaintiff an additional 20% of the amount provided by Defendant to complete repairs to his dwelling for GCOP.

21. At the time Defendant's adjuster(s)/agent(s) inspected the Plaintiff's dwelling, it was reasonably likely Plaintiff would incur the costs associated with retaining the services of a general contractor. Therefore, Plaintiff should have received payment for GCOP with his payment from Defendant. However, Defendant failed to provide Plaintiff a payment for GCOP and did not disclose to Plaintiff that he was entitled to payment from Defendant for GCOP.

22. Although the services of a general contractor were reasonably likely to be incurred, Defendant made no payment for GCOP to Plaintiff.

23. Pursuant to its handling of Plaintiff's loss, Defendant has a practice of not including required payments for GCOP and not disclosing entitlement to such payments in connection with loss or damage to dwellings under homeowners policies in Arkansas.

24. Plaintiff's claims in this suit only relate to losses arising under homeowners insurance policies.

No other types of policies or coverage, such as flood insurance and/or fire insurance, are at issue.

CLASS ALLEGATIONS

25. Plaintiff brings this lawsuit on behalf of himself, and all other persons similarly situated, pursuant to A.R.C.P. 23. The Class that the Plaintiff seeks to represent consists of:

> Any and all customers of The Standard Fire Insurance Company who are residents of Arkansas, who received payments under a homeowners insurance policy issued by The Standard Fire Insurance Company for physical loss or damage to their dwelling, such dwelling located in Arkansas, at any time between January 1, 2009 and December 31, 2010. Excluded from the Class are: (1) Defendant and all directors, officers, employees, partners, principals, shareholders and agents of Defendant; (2) Persons or entities who timely opt-out of this proceeding using the correct protocol for "opting-out" that will be formally established by this Court; (3) any and all Federal, State and/or Local Governments, including, but not limited to, their Departments, Agencies, Divisions, Bureaus, Boards, Sections, Groups, Councils and/or any other subdivision, and any claim that such governmental entities may have directly or indirectly; (4) Any currently-sitting Arkansas State Court Judge or Justice, and the current spouse and all other persons within the third-degree of consanguinity to such

judge/justice; (5) Any claim which resulted in the payment of policy limits or more by Defendant; and (6) Plaintiff's Counsel.

26. The Class comprises hundreds, and possibly thousands, of individuals geographically dispersed across Arkansas, the joinder of whom is impractical and the disposition of whose claims in a class action will provide substantial benefit to the parties and the court system. The identities of Class Members can be ascertained from Defendant's records. Joining and naming each Class Member as a co-plaintiff is unreasonable and impracticable.

27. There is a well-defined commonality of interest in the questions of law and fact that affect the Class Members. Indeed, questions of law and fact common to the Class plainly predominate over any questions affecting only individual Class Members. Some of these common questions of law and fact are:

a. Whether Class Members are entitled to payment of GCOP in connection with loss or damage to their dwelling;

b. Whether Defendant failed to pay Class Members GCOP in connection with loss or damage to their dwellings;

c. Whether Defendant breached the terms of its homeowners insurance policies with Class Members;

d. Whether Class Members are entitled to money damages for Defendant's breach of contract;

28. The claims asserted by Plaintiff are typical of claims of the Class. Plaintiff is a customer of Defendant. Plaintiff received payment from Defendant for loss or damage to his dwelling under his homeowners insurance policy. In connection with the payment from Defendant for loss or damage to Plaintiff's dwelling, Defendant failed to pay Plaintiff any amount for GCOP. Defendant further failed to disclose to Plaintiff that he was entitled to payment for GCOP.

29. The Plaintiff will fairly and adequately represent the interests of the Class. The interests of the Class are coincident with and not antagonistic to those of the Plaintiff. The Plaintiff has the ability to assist intelligently in the decision-making in connection with the litigation. Furthermore, Plaintiff is represented by legal counsel who are both competent and experienced in this type of class action litigation.

30. Defendant's conduct in withholding payments of GCOP in connection with loss or damage to dwellings was pursuant to policies and practices common to Class Members. Consequently, common questions of law and fact will predominate.

31. This Class Action is not only an appropriate method for the fair and efficient adjudication of this controversy but is, in fact, superior to all other available methods because:

a. The joinder of hundreds or thousands of geographically diverse individual Class Members across the state of Arkansas is

impracticable, cumbersome and unduly burdensome.

b. There is no special interest by Class Members in individually controlling the prosecution of separate actions;

c. Class Members' individual claims may be relatively modest compared with the expense of litigating the claim, making it impracticable, unduly burdensome and expensive, if not practicably impossible, for individual Class Members to redress their losses;

d. When the Defendant's liability has been adjudicated, claims of Class Members can be determined by the Court and administered efficiently and in a manner far less onerous and burdensome than if attempted through the filing of individual lawsuits;

e. This Class Action will promote an orderly and expeditious adjudication and administration of Class claims, and promote economies of time, effort and resources;

f. This Class Action will assure uniformity of decisions among Class Members;

g. Without this Class Action, Class Members will go without money damages;

h. Without this Class Action, no damages will be ordered and Defendant will reap the benefits of the monies they have retained as a result of their breach of contract; and

i. The resolution of this controversy through this Class Action presents fewer management difficulties than individually filed lawsuits and conserves the resources of the parties and the judicial system while protecting the rights of each Class Member.

32. Plaintiff seeks money damages for himself and the Class for breach of contract arising from Defendant's failure to provide proper payments for GCOP. As discussed herein, when owed, payment for GCOP should be 20% of the amount paid by Defendant to complete repairs to a damaged dwelling.

FRAUDULENT CONCEALMENT

33. Rather than disclosing information about entitlement to GCOP to Plaintiff, Defendant actively concealed information about entitlement to GCOP and represented that the amount paid was all that was owed under the homeowners policy.

34. Through the claims process, Plaintiff and Class Members asked Defendant what was owed to them under the terms of their respective homeowners policies for their claims. Defendant responded that the amount settled for was all that was owed. Plaintiff and Class Members justifiably relied on Defendant's representation that the amount paid was all that was owed.

35. Defendant's acts described herein were executed in a manner that was designed to conceal entitlement to GCOP. Plaintiff and Class Members

could not have known of their entitlement to GCOP through the exercise of reasonable diligence because of Defendant's actions.

36. Additionally, because of the fiduciary duty owed by Defendant to Plaintiff and Class Members and/or the special relationship between Defendant and Plaintiff/Class Members, Defendant had an obligation to disclose information concerning entitlement to GCOP payments to Plaintiff and Class Members. Defendant failed to disclose this information.

37. Defendant's fraudulent concealment tolls the running of any applicable statute of limitations. Plaintiff is not asserting a cause of action or seeking damages for fraud, but is pleading fraudulent concealment for the sole purpose of tolling the statute of limitations. Indeed, fraudulent concealment is not a cause of action, and is simply a response against the defense of statute of limitations. See *Barre v. Hoffman,* 2009 Ark. 373, 326 S.W.3d 415; *Jones v. Central Ark. Radiation Therapy Inst., Inc.,* 270 Ark. 988, 607 S.W.2d 334 (1980).

MISCELLANEOUS

38. Any condition precedent to the institution of this lawsuit has been performed, has occurred, or has been waived.

BREACH OF CONTRACT

39. Plaintiff fully incorporates into this Paragraph each and every allegation contained in Paragraphs 1 through 38 of this Complaint as if each were fully iterated verbatim herein.

40. As previously indicated, Plaintiff's dwelling was insured pursuant to a policy of homeowners insurance by the terms of which Defendant agreed to properly pay Plaintiff for losses occasioned by certain events or occurrences.

41. Defendant's policies are standardized contracts which were drafted by the Defendant and imposed upon their policyholders without the ability to negotiate the terms. Policyholders were given the choice only of adhering to Defendant's standard policy language or rejecting the policy. As such, the policies are contracts of adhesion.

42. All conditions precedent to Defendant's liability under their standardized homeowners insurance policies have been performed including the payment of all premiums necessary to keep the policies in effect and the presentation of claims by insured persons for losses under their homeowners policies in question.

43. On or about March 10, 2010, Plaintiff's home was damaged by a named peril and Defendant was, pursuant to the policy of insurance, required to fully and properly pay Plaintiff for all damages occasioned thereby.

44. Though Plaintiff fulfilled all policy obligations imposed upon him by Defendant's insurance contract, Defendant materially breached the terms of their standardized policy contracts with Plaintiff and the Class by failing to include payments for GCOP.

45. As a result of Defendant's material breaches of their policy contracts, Plaintiff and the Class have been damaged.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, Greg Knowles, individually and as class representative on behalf of all similarly situated persons within the State of Arkansas, respectfully prays for relief and judgment against the Defendant as follows:

A. Certifying that the action may be maintained as an Arkansas-only class action under A.R.C.P. 23, and appointing Plaintiff and Plaintiff's counsel to represent the Class;

B. Awarding money damages to Plaintiff and Class Members from the Defendant for their breach of contract in an amount equal to the amount that should have been paid to Class Members for GCOP (20% of the amount paid by Defendant to complete repairs to the damaged property), which, when aggregated with all other elements of damages, costs, and fees, will not exceed $75,000 for Plaintiff individually or any Class Member individually and/or $5,000,000 for the entire Class combined;

C. Awarding pre-judgment interest, which, when aggregated with all other elements of damages, costs, and fees, will not exceed $75,000 for Plaintiff individually or any Class Member individually and/or $5,000,000 for the entire Class combined;

D. Awarding attorneys' fees and costs, which, when aggregated with all other elements of damages, costs, and fees, will not exceed $75,000 for Plaintiff individually or any Class Member individually and/or $5,000,000 for the entire Class combined;

Plaintiff seeks recovery of less than $75,000 for himself and each Class Member, inclusive of costs and attorneys' fees, from Defendant and/or total aggregate damages for himself and all Class Members, inclusive of costs and attorneys' fees, in an amount less than five million dollars ($5,000,000), jointly and severally from Defendant. Plaintiff makes no claim for declaratory on [sic] injunctive relief. Although asserting no cause of action that would support a punitive damage award, Plaintiff specifically disclaims any actual or potential entitlement to punitive damages and stipulates that he will not seek punitive damages in this action.

Respectfully Submitted,

KEIL & GOODSON P.A.
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BY: /s/ Matt Kiel
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EXHIBIT A

Sworn and Binding Stipulation

Before me, the undersigned authority on this day personally appeared Greg Knowles, known to me to be the undersigned Affiant whose name is subscribed below, who, after having been duly sworn by me, upon his oath deposed and stated as follows:

1. My name is Greg Knowles. I am a plaintiff in this lawsuit. I am over the age of eighteen. I am of sound mind, capable of making this affidavit, fully competent to testify to the matters stated herein, and am under no legal disability. I have personal knowledge of the

facts and statements contained herein, and of the facts and statements are true and correct.

2. I do hereby swear and affirm that I do not now, and will not at any time during this case, whether it be removed, remanded, or otherwise, seek damages for myself or any other individual class member in excess of $75,000 (inclusive of costs and attorneys' fees) or seek damages for the class as alleged in the complaint to which this stipulation is attached in excess of $5,000,000 in the aggregate (inclusive of costs and attorneys' fees).

3. I understand that this stipulation is binding, and it is my intent to be bound by it.

Further affiant sayeth not.

/s/ Greg Knowles
Greg Knowles

SUBSCRIBED AND SWORN TO BEFORE ME, to which witness my hand and official seal on this 13th day of April, 2011.

/s/ Carmen Renee Heflin
Notary Public

[NOTARY STAMP]

Commission Expires: 1-27-2018

OPPOSITION BRIEF

RECORD
AND
BRIEFS

No. 11-1450

IN THE

Supreme Court of the United States

THE STANDARD FIRE INSURANCE COMPANY,
Petitioner,

v.

GREG KNOWLES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should review a District Court decision remanding this case for lack of federal subject-matter jurisdiction, where: (i) the District Court order was left unreviewed by the Court of Appeals for the Eighth Circuit, (ii) the order does not conflict with the judgment of any Circuit Court of Appeals, (iii) the order does not present an important question of federal law, and (iv) the question Petitioner seeks to present will be subsequently reviewable on certiorari from the state's highest court.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Greg Knowles ("Plaintiff") respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari ("Petition"). The Petition should be denied, for numerous reasons:

- The Petition seeks review not of a final decision by a *circuit court* on the merits, but rather of a *district court* order, regarding which the Eighth Circuit Court of Appeals denied permission to appeal.

- The Petition is premature because Respondent will be able to seek review of the same issue (the "binding" nature of a stipulation), on a full record, after the state courts decide the class certification issue.

- There is no circuit conflict. In fact, the most the Petition contends is that "[s]everal circuits, at least in dicta, have rejected the Eighth Circuit's view" (Pet. 17) *not in this case*, but *in a different case*, *Rolwing v. Nestle Holdings, Inc.*, 666 F.3d 1069 (8th Cir. 2012). The Petition ultimately acknowledges that "the Eighth Circuit, in *Rolwing*, was the first court of appeals to address the question presented squarely." Pet. 19. In short, the Petition essentially acknowledges the absence of a conflict. And it effectively asks this Court to review the Eighth Circuit's decision in another matter (*Rolwing*), *not* the district court order in this case (which does not even cite *Rolwing*).

- The Petition erroneously maintains that the district court's order in this case conflicts with this Court's decision in *Smith v. Bayer*, 131 S. Ct. 2368 (2011). That is untrue. *Smith v. Bayer* involved a completely different issue, and there is no conflict.

- The Petition involves the fact-specific application of well-settled principles of law. The Petition does not mention the fact that earlier this Term, this Court denied certiorari on the same question in No. 11-287, *Skechers USA, Inc. v. Tomlinson*, 132 S. Ct. 551 (Nov. 7, 2011).

The Petition should be denied.

STATEMENT

This case involves a putative class action filed in Arkansas state court (Miller County Circuit Court) on April 13, 2011, on behalf of a class of Arkansas residents. Pet. App. 3a. The action pleads no federal claims – only claims under Arkansas state law, based on injuries to Arkansas residents. *Id.* Plaintiff alleges that Defendant The Standard Fire Insurance Company ("Standard Fire") breached homeowners insurance policies by failing to fully reimburse losses – in particular, by failing to pay for charges reasonably associated with retaining the services of a general contractor to repair or replace damaged property. *Id.*

On May 18, 2011, Standard Fire removed the action to the U.S. District Court for the Western District of Arkansas. The sole basis of federal subject-matter jurisdiction asserted by Standard Fire was the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d)(2). CAFA creates

federal subject-matter jurisdiction when three conditions are met: (1) an aggregate amount in controversy exceeding five million dollars ($5,000,000.00), exclusive of interest and costs; (2) a putative class with more than 100 members; and (3) minimal diversity, *i.e.*, a class in which at least one member is a citizen of a different state from any defendant. *Id.*

However, CAFA jurisdiction does not exist in this case, because the amount in controversy as a legal certainty does not exceed $5 million. The Complaint states that "neither Plaintiff's nor any individual Class Member's claim is equal to or greater than seventy-five thousand dollars ($75,000), inclusive of costs and attorneys fees, individually or on behalf of any Class Member . . . . Moreover, the total aggregate damages of the Plaintiff and all Class Members, inclusive of costs and attorneys' fees, are less than five million dollars ($5,000,000), and the Plaintiff and Class stipulate they will seek to recover total aggregate damages of less than five million dollars ($5,000,000)." *Id.* at 5a-6a.

Further, Exhibit A to the Complaint is a "Sworn and Binding Stipulation," signed by Plaintiff, affirming that he will not at any time during the pendency of the case "seek damages for myself or any other individual class member in excess of $75,000 (inclusive of costs and attorneys' fees) or seek damages for the class as alleged in the complaint to which this stipulation is attached in excess of $5,000,000 in the aggregate (inclusive of costs and attorneys' fees)." *Id.* at 6a.

Accordingly, Plaintiff moved to remand this action to Arkansas state court. By Memorandum Opinion and Order of December 2, 2011, the federal district court granted the motion to remand. The court opined:

> The overarching argument Defendant submits is that the Court should completely disregard Plaintiff's self-imposed limitations in his Complaint and attached stipulation, and instead calculate the amount in controversy based on the possibility that Plaintiff could amend his Complaint in the future to increase the amount of recovery sought. Speculation as to Plaintiff's future actions cannot vest this Court with jurisdiction where it otherwise has none at the time of removal. If a court could base its jurisdiction solely upon the possibility of a future amendment by a plaintiff, any case filed in state court would be susceptible to removal no matter how the plaintiff stated his claims.

Pet. App. 12a. The district court noted that "[t]he Arkansas legislature has addressed this very issue in passing a statue this year that codifies *Bell* [*v. Hershey Co.*, 557 F.3d 953 (8th Cir. 2009)] and explicitly allows a plaintiff to file a binding stipulation 'with respect to the amount in controversy' in order to establish subject matter jurisdiction." *Id.* (citing Ark. Code Ann. § 16-63-221(a)).

The court addressed Standard Fire's concern that the Plaintiff would subsequently amend the Complaint to raise the requested damages:

> Defendant's concern about Plaintiff's future amendment of the Complaint is of no moment. If Plaintiff were to amend his Complaint after remand, disclaiming his sworn stipulation and seeking instead an amount in excess of the jurisdictional maximum, it follows that Defendant would have the right to remove again, should removal be justified.

Id. at 13a. The court also responded to Standard Fire's argument that "a class plaintiff has no right to limit recovery for a class without court approval." *Id.* at 14a. The court opined that "putative class members may simply opt out of the class and pursue their own remedies if they feel that the limitations placed on the class by Plaintiff are too restrictive." *Id.*

On January 4, 2012, the Eighth Circuit denied Standard Fire's petition for permission to appeal, without recorded dissent. *Id.* at 1a. On March 1, 2012, the Eighth Circuit denied Standard Fire's petition for rehearing, again without recorded dissent. *Id.* at 16a.

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT INVOLVE A DECISION ON THE MERITS BY THE COURT OF APPEALS.

The first reason to deny certiorari is the fact that the case at bar does not involve a decision on the merits by the Eighth Circuit. Rather, this case concerns an unpublished decision by the U.S. District Court for the Western District of Arkansas that was left unreviewed by the Court of Appeals for the Eighth Circuit, which denied Standard Fire's petition for permission to appeal. Pet. App. 1a.

Accordingly, there can be no "circuit conflict" because there is no meaningful decision in this case by a circuit court of appeals. Rather, Standard Fire asks this Court to review a district court remand order that the Eighth Circuit declined to review.

Even if the district court judgment in this case were directly in conflict with the decision of a court of appeals outside the Eighth Circuit (and, as discussed in Part IV, *infra*, there is no such conflict), there would be no basis for certiorari. This Court's practice with respect to district court decisions is well known:

> The Supreme Court will not grant certiorari to review a decision of a federal court of appeals merely because it is in direct conflict on a point of federal law with a decision rendered by a district court, whether in the same circuit or in another circuit. The Court tries to achieve uniformity in federal matters only among the various courts whose

> decisions are otherwise final in the absence of Supreme Court review – the courts of appeals, other federal courts of the same stature, and the highest state courts in which decisions may be had.

Eugene Gressman, et al., SUPREME COURT PRACTICE 256 (9th ed. 2007).

Standard Fire cites *Hohn v. United States*, 524 U.S. 236 (1998), for the proposition that this Court may grant certiorari after a court of appeals denies permission to appeal. Pet. 1. But *Hohn* involved a certificate of appealability under the Antiterrorism and Effective Death Penalty Act (AEDPA), not a petition for permission to appeal in a civil case, and in any event the issue is not the raw jurisdictional power of this Court but rather the prudential use of its certiorari authority. This Court has explained that it grants certiorari "to resolve disagreement among the *courts of appeals* on a question of national importance." *Grutter v. Bollinger*, 539 U.S. 306, 322 (2003) (emphasis added); *see also Clay v. United States*, 537 U.S. 522, 524 (2003) (granting review of "recurring question on which courts of appeals have divided"). The instant case does not involve a decision by a court of appeals on the merits.

Standard Fire fails to acknowledge the extraordinary nature of its request. Instead, it refers repeatedly to the "decisions below" (Pet. 10), the "Orders Below" (*id.* at 11, 13) (quoting headings), and what the "Lower Courts" ruled (*id.* at 11) (quoting heading), without making clear that this case involves an unpublished and unreviewed

decision by a district court, not a decision on the merits by the Eighth Circuit.

At times, Standard Fire appears to seek review of the Eighth Circuit's decision in an entirely different case, *Rolwing v. Nestle Holdings, Inc.*, 666 F.3d 1069 (8th Cir. 2012). For example, Standard Fire contends that "[t]he Eighth Circuit's conclusion in *Rolwing* is erroneous." Pet. 11. *See also id.* at 17 citing *Rolwing*). But the *Rolwing* case, rather than this one, would be the proper vehicle for reviewing the Eighth Circuit's decision in *Rolwing*. *Rolwing* was decided *after* the district court's Memorandum Opinion and Order in this case and hence was not cited by the district court. Nor was *Rolwing* cited in any of the Eighth Circuit Orders in this case.

If Standard Fire is correct that the use of binding stipulations is frequent (Pet. 8), then this Court will have ample opportunities in the future to review the question presented. The instant case is not an appropriate vehicle.

II. THIS CASE DOES NOT REPRESENT AN APPROPRIATE VEHICLE TO DECIDE THE QUESTION PRESENTED.

A. Standard Fire's Argument Is Premature Because The State Courts Have Yet To Consider Class Certification.

Certiorari should be denied for the further reason that the question Standard Fire seeks to present is premature. Standard Fire asks this Court to decide whether a stipulation limiting the amount of damages a putative class representative seeks is binding on absent class members. Standard Fire

contends that "the absent putative class members did not receive any notice, and therefore had no opportunity to be heard" and that "the stipulation device jeopardizes the rights of the putative class members." Pet. 14.

This argument is misguided and premature. The state courts have yet to rule on Plaintiff's motion for class certification. Indeed, because Standard Fire removed the case to federal court shortly after it was filed, Plaintiff has not even moved for class certification. If and when Plaintiff moves to certify a class, Standard Fire will be free to argue that the stipulation violates the due process rights of absent class members and that Plaintiff's stipulation is a factor to consider in whether the class should be certified or whether Plaintiff is an adequate class representative.[1] If the state court agrees with Standard Fire's position that the class should not be certified, then the defendant will not face a class action or any of the risks of which it complains. If a state court ultimately grants a motion for class certification, Standard Fire will have the opportunity to pursue appellate review in the usual

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[1] *See Holcombe v. Smithkline Beecham Corp.*, 272 F. Supp.2d 792, 793 (E.D. Wis. 2003) ("Judicial concern about a limitation on the value of claims may be addressed when the question of plaintiff's adequacy as a representative is considered."); *Four Way Plant Farm, Inc. v. National Council on Compensation Ins.*, 894 F. Supp. 1538, 1544 (M.D. Ala. 1995) ("Whether plaintiffs, as representatives of a presently uncertified class, can waive any potential federal claims is an issue to consider when deciding whether the class should be certified or what class should be certified.").

course and eventually to seek certiorari on its due process arguments.

Such review, coming at a later time, would provide Standard Fire with the chance to raise its objection on the basis of a fully developed record on the adequate representation issue. That record would enable this Court to make a more informed assessment of the reasonableness of Plaintiff's binding stipulation, in light of the available evidence, Standard Fire's potential defenses, the likely damages and relief, and other issues.

B. Standard Fire's Argument Is Premature Because It Would Have The Chance To Invoke CAFA Removal At A Later Time.

Standard Fire's Petition is premature for a second reason: it will have the opportunity to present its arguments for a federal forum if and when the class action ever seeks more than $5 million in damages. CAFA eliminates the requirement that cases must be removed within one year of filing. 28 U.S.C. § 1453(b). Under CAFA, a case may be removed at any time, assuming that the requirements of federal subject-matter jurisdiction are satisfied. *Id.*

Thus, if Standard Fire is correct that Plaintiff's tactics create the potential for "[a]buses" (Pet. 16) – perhaps because "Plaintiff left open some doors to potentially modify or negate his 'stipulation' at a later date" or because the class definition may be "altered at a later point" (*id.* at 8) – then Standard Fire could attempt to remove this action to federal court pursuant to CAFA. Similarly, if a future court ever ruled that the stipulation is not binding on

absent class members as a matter of due process, enabling a different class representative to pursue claims for different relief and different amounts in controversy, then Standard Fire would be free to invoke CAFA at that time.

Notably, the district court made precisely this point, and Standard Fire's Petition offers no response to the district court's analysis that a defendant facing a change in circumstances would be free to seek the protections of CAFA:

> Defendant's concern about Plaintiff's future amendment of the Complaint is of no moment. If Plaintiff were to amend his Complaint after remand, disclaiming his sworn stipulation and seeking instead an amount in excess of the jurisdictional maximum, it follows that Defendant would have the right to remove again, should removal be justified.

Id. at 13a.

III. THE DECISION BELOW IS CONSISTENT WITH *SMITH v. BAYER*.

Standard Fire maintains that the district court's order in this case conflicts with this Court's decision in *Smith v. Bayer*, 131 S. Ct. 2368 (2011). That is untrue. *Smith v. Bayer* did not involve a binding stipulation or subject-matter jurisdiction under CAFA. Rather, *Smith v. Bayer* concerned a federal court injunction ordering a West Virginia state court not to consider a motion for class certification filed by plaintiffs who had previously been absent class members in a federal court action in the District of

Minnesota, which had denied class certification. This Court held that the injunction was improper under the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283.

This Court explained that absent class members were not "parties" to the Minnesota federal court proceeding, partly because the federal court had denied class certification: "The definition of the term 'party' can on no account be stretched so far as to cover a person like Smith, whom the plaintiff in a lawsuit was denied leave to represent." *Id.* at 2379.

The instant case is different. This case involves a question of removal under CAFA, not a decision to enjoin a state-court proceeding and the implications of the Anti-Injunction Act. Indeed, if the West Virginia state-court proceeding in *Smith v. Bayer* had been subject to removal to federal court under CAFA, then there would have been no need to enjoin it.

Moreover, this case is different from *Smith v. Bayer* because here there has been no ruling on class certification by any court, and thus this case does not involve a lawsuit by an absent class member seeking to relitigate an order rendered at a previous stage of the case, when there was a different class representative.

Rather, the question in the instant case is whether there was federal jurisdiction *at the time of removal* over *this* action filed by *this* Plaintiff – i.e., whether the stipulation is binding *now* on Plaintiff and on the class *now* being proposed by the Plaintiff. It is hornbook law that federal subject-matter jurisdiction must be determined based upon the

allegations of the complaint as set forth at the time the petition for removal was filed and that contingent events are inadequate to establish federal jurisdiction. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003); *see also Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381, 390 (1998) ("for purposes of removal jurisdiction, we are to look at the case as of the time it was filed in state court – prior to the time the defendants filed their answer in federal court").

Smith v. Bayer presented a separate issue: the ability of an absent class member to relitigate (in a *subsequent* action) a certification question previously resolved by a different court. *Smith v. Bayer* did not involve a case at the time of removal. By contrast, the question here is whether federal subject-matter jurisdiction existed in the case at bar at the time of removal. It is not relevant to that question whether the stipulation might be held invalid in a hypothetical future ruling, either at the class certification stage or in a subsequent proceeding.

The distinction between (i) the situation at the time of removal and (ii) contingent future events was the key point made in Plaintiff's Response to the Petition for Rehearing in the Court of Appeals, Pet. App. 27a, 29a, which the Petition takes out of context. Pet. 11. Plaintiff did not "concede[]" in the Court of Appeals that the stipulation was not binding for present purposes. *Id.* Rather, Plaintiff explained that "Defendant's argument is just a premature challenge to whether Plaintiff is an adequate representative." Pet. App. 29a.

> In sum, Plaintiffs proposing class actions can and often must make decisions affecting the ultimate value of the claims of merely "proposed" class members. Importantly, the due process rights of such proposed class members are always protected before any such decisions are considered "binding." In particular, the plaintiff must always demonstrate "adequate representation" of the class throughout the case.

Id.

Plaintiff's point was that the decision to stipulate to damages of a certain size is no different from innumerable other decisions that class representatives inevitably make as masters of their complaints. Named plaintiffs bringing putative class actions necessarily "limit" the recovery of the proposed class by, for example, picking and choosing which defendants to sue, which causes of action and elements of damages to include, and what kinds of litigation tactics to pursue in discovery, pretrial motions, and beyond. The ability of a court at the certification stage to consider a stipulation (along with other litigation decisions by the proposed class representative) in assessing adequacy of representation does not mean that the stipulation and other features of the complaint may be disregarded in determining whether there is federal subject-matter jurisdiction at the time of removal.

Otherwise, removal jurisdiction would arise in virtually any class action filed in state court, even if it involved only state residents and pleaded solely state law claims below the CAFA jurisdictional

minimum. If a putative class representative's decisions in framing the complaint could be disregarded, a federal court could always speculate (for example) that an entirely hypothetical new class representative *might* assert a federal claim for the class (establishing federal question jurisdiction) or *might* expand the class to meet the CAFA jurisdictional minimum.

That is not the law under CAFA, and more specifically nothing in *Smith v. Bayer* addresses that question. There is no merit to Standard Fire's argument that the orders below conflict with *Smith v. Bayer*.

IV. THERE IS NO CIRCUIT CONFLICT.

Certiorari should be denied because the district court's order in this case does not conflict with decisions of any circuit court. Standard Fire suggests that "[s]everal circuits, at least in dicta, have rejected the Eighth Circuit's view" (Pet. 17), but ultimately acknowledges that "the Eighth Circuit, in *Rolwing*, was the first court of appeals to address the question presented squarely." *Id.* at 19. This case is not *Rolwing*, and in any event Standard Fire's acknowledgement of the absence of a square circuit conflict should be the end of the matter with respect to certiorari.

Instead of presenting the kind of well-developed and mature circuit conflict that this Court considers in its certiorari process, this case involves a district court order that is consistent with precedent in every other circuit.

• From the Fifth Circuit, Standard Fire cites a pre-CAFA case, *Manguno v. Prudential Property & Casualty Ins. Co.*, 276 F.3d 720 (5th Cir. 2002), which upheld the denial of a class representative's motion to remand because a purported waiver of attorneys' fees was inconsistent with state law. *Id.* at 722. In the instant case, by contrast, the district court held that Plaintiff's stipulation was consistent with state law. Pet. App. 12a. Further, in *Manguno*, the Fifth Circuit opined (in a portion of the opinion not quoted by Standard Fire):

> Manguno's purported waiver of attorney's fees is ineffective. Louisiana Code of Civil Procedure article 862 provides that state courts will grant to a successful plaintiff the relief to which she is entitled, even if she has not demanded such relief.

276 F.3d at 724. Only then did the Fifth Circuit offer the dictum quoted by Standard Fire: "Moreover, it is *improbable* that Manguno can ethically unilaterally waive the rights of the putative class members to attorney's fees without their authorization." *Id.* (emphasis added). Thus, the Fifth Circuit did not squarely address the issue presented by Standard Fire, and its views on what a class representative may "ethically" do are pure dicta.

• Standard Fire also cites an unpublished Fifth Circuit decision, *Ditcharo v. United Parcel Serv., Inc.*, 376 Fed. Appx. 432 (5th Cir. 2010), which under the Fifth Circuit's rules is not precedential except in very limited circumstances. 5th Cir. R. 47.5.4.

• From the Sixth Circuit, Standard Fire cites dictum from *Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 405, 407 (6th Cir. 2007), but Standard Fire ignores the *holding* of *Smith*, which was that the jurisdictional requirements of CAFA could not be met where a class representative pleaded only breach of contract claims and expressly disclaimed punitive damages in the complaint:

> In the Amended Complaint, Plaintiff "disclaims any ... punitive damages" on his behalf or that of the class members. He has further disclaimed recovery of punitive damages by pleading only breach of contract claims. . . . Accordingly, there is no merit to Defendant's argument that an allegation of a breach of the contractual duty of good faith and fair dealing and Defendant's alleged attempt "to keep Plaintiff from discovering the truth about its contractual obligations" would be sufficient grounds upon which to base an award of punitive damages in this instance. To decide otherwise on these facts would require a strained reading of the complaint and completely discount Plaintiff's express disclaimer.

Id. at 408. The Sixth Circuit opined that "[i]t is well established that the plaintiff is 'master of [his] complaint' and can plead to avoid federal jurisdiction. Accordingly, subject to a 'good faith' requirement in pleading, a plaintiff may sue for less than the amount [he] may be entitled to if [he] wishes to avoid federal jurisdiction and remain in state court." *Id.* at 407 (citation omitted; all but first brackets in original).

• From the Seventh Circuit, Standard Fire cites dictum from *Pfizer, Inc. v. Lott*, 417 F.3d 725 (7th Cir. 2005), but omits mention of the holding of that case: that CAFA did not apply to the plaintiff's suit at all, because it was filed prior to the effective date of the statute. *Id.* at 726-27. The Seventh Circuit's comment that a "stipulation would not bind the other members of the class," *id.* at 725, was dictum.

• Also from the Seventh Circuit, Standard Fire also cites *Back Doctors Ltd. v. Metropolitan Property & Casualty Ins. Co.*, 637 F.3d 827 (7th Cir. 2011) (Easterbrook, C.J.), which found that the $5 million CAFA jurisdictional threshold was met on the basis of a punitive damages claim. However, the complaint in the instant case does not seek punitive damages. Moreover, the plaintiff in *Back Doctors* did not file anything limiting the amount of the claim. As the Seventh Circuit explained:

> Back Doctors did not file in state court a complaint that disclaimed punitive damages or otherwise make a disavowal that is conclusive as a matter of state law. Instead it declared in the district court that it does not "now" want punitive damages, and the district judge relied on this when remanding the suit.

637 F.3d at 830.

Contrary to Standard Fire's implication, the Seventh Circuit actually approved the use of a stipulation: a "plaintiff in Illinois can limit the relief to an amount less than the jurisdictional minimum, and thus prevent removal, by filing a binding stipulation or affidavit with the complaint." *Id.* at

831. The court explained that "[l]itigants sometimes . . . prevent removal, by forswearing any effort to collect more than the jurisdictional threshold." *Id.* at 830. For that proposition, *Back Doctors* cited *Oshana v. Coca-Cola Co.*, 472 F.3d 506 (7th Cir. 2006), a class action case in which the Seventh Circuit reaffirmed that "the plaintiff [is] the master of the complaint" and opined that "[i]f [named plaintiff] Oshana really wanted to prevent removal, she should have stipulated to damages not exceeding the $75,000 jurisdictional limit. . . . A stipulation would have had the same effect as a statute that limits a plaintiff to the recovery sought in the complaint." *Id.* at 511-12.

Back Doctors also cited the Seventh Circuit's prior decision in *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005) (Easterbrook, J), a class action case under CAFA explaining that, because the plaintiff is the "master of the case" and "may limit his claims (either substantive or financial) to keep the amount in controversy below the threshold," the removing party must "show not only what the stakes of the litigation could be, but also what they are given the plaintiff's actual demands." 427 F.3d at 44; *see also Garbie v. DaimlerChrysler Corp.*, 211 F.3d 407, 411 (7th Cir. 2000) ("Even if the Michiganders were added [to the class action] to prevent removal, that is their privilege; plaintiffs as masters of the complaint may include (or omit) claims or parties in order to determine the forum.").

Hence, the Seventh Circuit, in *Back Doctors* itself and in other decisions reaffirmed in *Back Doctors*, has plainly recognized that a plaintiff in a

class action remains the master of the complaint and may properly limit claims in order to avoid federal jurisdiction.

There is no conflict between the district court decision in the instant case and precedent in either the Fifth or Seventh Circuits.

V. THIS CASE DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW.

Standard Fire contends that the district court's decision violates the due process rights of absent class members and contravenes the purpose of CAFA. Pet. 13-17. Those contentions are baseless. The district court applied well-settled law in a fact-bound way that raises no important federal question. That is no doubt why, earlier this Term, this Court denied certiorari on the same question in No. 11-287, *Skechers USA, Inc. v. Tomlinson*, 132 S. Ct. 551 (Nov. 7, 2011).

This Court has long recognized that, "since the plaintiff is the master of the complaint, the well-pleaded-complaint rule enables him . . . to have the cause heard in state court" by limiting the claim to avoid federal subject-matter jurisdiction. *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 831 (2002) (internal quotation marks and citation omitted). *See, e.g.*, *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938) ("If [the plaintiff] does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the

defendant cannot remove."). In fact, the general rule that a plaintiff may frame her suit to avoid removal jurisdiction has been the law for over a century.[2]

This Court is familiar with the same principle in the context of class actions. For example, *United States v. Hohri*, 482 U.S. 64 (1987), involved a putative class action suit by nineteen individuals (former internees or their representatives) against the United States. The named plaintiffs limited requested damages to $10,000 per claim in order to qualify for federal district court jurisdiction and avoid the claims court. *Id.* at 66 & n.1. This Court did not suggest any infirmity with that jurisdictional strategy.

Standard Fire contends that limiting class claims below the jurisdictional threshold would circumvent CAFA's statutory scheme. To the contrary: Such a limitation serves CAFA's purposes by ensuring that the damages in this case will be capped at $5 million and will not present the risk of

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[2] *See, e.g.*, *Central R. Co. v. Mills*, 113 U.S. 249, 257 (1885) ("[T]he question whether a party claims a right under the constitution or laws of the United States is to be ascertained by the legal construction of its own allegations, and not by the effect attributed to those allegations by the adverse party."); *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) ("Of course, the party who brings a suit is master to decide what law he will rely upon . . . .") (Holmes, J.); *Great North R. Co. v. Alexander*, 246 U.S. 276, 282 (1918) ("[T]he plaintiff may by the allegations of his complaint determine the status with respect to removability of a case . . . ."); *see also Iowa City Ry. v. Bacon*, 236 U.S. 305, 308 (1915) (holding that plaintiff could defeat removal by requesting only $1,900 in damages (at a time when the jurisdictional threshold was $2,000), even though plaintiff's loss was $10,000).

a limitless judgment. The limitation avoids the risks of enormous class action judgments that Standard Fire argues motivated the enactment of CAFA.

Moreover, limiting claims is perfectly consistent with CAFA. Section 2(b) of CAFA states that one of "[t]he purposes of th[e] Act" is to "restore the intent of the framers of the United States Constitution by providing for federal court consideration of interstate cases of national importance under diversity jurisdiction." 28 U.S.C. § 1711 note, subpart (2). Cases like this one – involving purely state-law claims by residents of a single state, below the jurisdictional minimum – do not implicate the congressional purpose.

Further, the longstanding nature of the jurisdictional principle applied by the district court militates against any inference that CAFA meant to displace it *sub silentio*. This Court has opined that "[w]e assume that Congress is aware of existing law when it passes legislation." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). Nothing that Congress included in CAFA suggests that a plaintiff bringing a class action is no longer the master of her complaint or is somehow prevented from "suing for less than the jurisdictional amount." *St. Paul Mercury*, 303 U.S. at 294.

Standard Fire insists, with less than complete plausibility, that it seeks to vindicate the due process interests of absent class members. It maintains that the stipulation is not fair to absent class members, who supposedly would be in better hands if Standard Fire were permitted to protect their interests by removing this case to federal court.

Standard Fire's argument that class representatives should not be permitted to make unilateral decisions as to damages has no merit. A decision to stipulate to a particular level of damages is no different from any other strategic choices that a class representative must make in litigating a case, and "any putative class members who disagree with the Plaintiffs limitation of damages have the ability to opt out from the class at the appropriate time." *Hooks v. Associates Fin. Serv. Co.*, 966 F. Supp. 1098, 1101 (M.D. Ala. 1997).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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Dated: July 2, 2012

REPLY BRIEF

No. 11-1450

In The Supreme Court of the United States

THE STANDARD FIRE INSURANCE COMPANY,

Petitioner,

v.

GREG KNOWLES, Individually and as Class Representative on Behalf of all Similarly Situated Persons Within the State of Arkansas,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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REPLY BRIEF FOR PETITIONER

Plaintiff does not even attempt to argue that he had the authority to bind the absent members of his proposed, uncertified class when this case was removed to federal court. Unless Plaintiff had that authority, his allegation that "the Plaintiff *and Class* stipulate they will seek to recover total aggregate damages of less than five million dollars," Pet. App. 60 (emphasis added), and attempted stipulation to the same effect, Pet. App. 75, cannot defeat federal jurisdiction. Neither Plaintiff nor the District Court nor the Eighth Circuit offered any supporting authority for the proposition that Plaintiff, who does not represent the absent members of his proposed but uncertified class, somehow had the ability to bind them as of the time of removal. If Plaintiff's stipulation does not bind them, federal jurisdiction exists in this case, as the District Court acknowledged.

The decision below finding Plaintiff's stipulation to be binding is contrary to the Class Action Fairness Act of 2005 ("CAFA"), contrary to this Court's decision in *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011), and contrary to basic due process principles articulated in *Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). The result below is also contrary to the intervening Tenth Circuit opinion in *Frederick v. Hartford Underwriters Ins. Co.*, 2012 WL 2443100 (10th Cir. June 28, 2012), which establishes a direct circuit conflict. Certiorari should be granted.

ARGUMENT

I. THE DECISIONS BELOW ARE CONTRARY TO *SMITH v. BAYER CORP.*

Plaintiff concedes, correctly, that "the question in the instant case is whether there was federal jurisdiction *at the time of removal* . . . i.e., whether the stipulation is binding *now* on Plaintiff and on the class *now* being proposed by the Plaintiff." Opp. at 12 (emphasis in original). As Plaintiff admits, it is "hornbook law" that jurisdiction must be determined at the time of removal, and thus, the question is whether Plaintiff's stipulation was binding, as of the time of removal, on those persons who fall within the definition of Plaintiff's proposed class. *Id.* at 12-13. Tellingly, Plaintiff *fails* to even attempt to explain how, as a matter of law, his stipulation could have bound such persons as of the time of removal, where the absent members of the putative class are not parties to this litigation because no class has been certified. Plaintiff has no authority, either in fact or under the law, to represent them.

Indeed, Plaintiff, through his new Supreme Court counsel, attempts at length to explain away his Eighth Circuit counsel's acknowledgement that "[i]t is true, *of course*, that *merely filing a proposed class action will not 'bind' proposed class members*." (Pet. App. 27 (emphasis added); Opp. at 13-14.) But, while he tries to deflect the Court's focus onto other issues, even Plaintiff is not "willing to advance the novel and surely erroneous argument that a nonnamed class

member is a party to the class-action litigation *before the class is certified.*" *Devlin v. Scardelletti*, 536 U.S. 1, 16 n.1 (2002) (Scalia, J., dissenting). He also provides no explanation for how a non-binding stipulation could possibly satisfy his burden to contradict the evidence put forth by Standard Fire that was accepted by the District Court, and establish, to a "legal certainty," that the amount in controversy is below $5 million. *Bell v. Hershey Co.*, 557 F.3d 953, 956 (8th Cir. 2009).

Like Plaintiff, the District Court and Eighth Circuit (in *Rolwing v. Nestle Holdings, Inc.*, 666 F.3d 1069 (8th Cir. 2012)), also failed to explain how a stipulation could bind absent members of an uncertified putative class, or how a non-binding stipulation could conclusively establish the amount in controversy. They therefore failed to follow basic, fundamental principles of class action law and due process. As this Court held last Term in *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2382 (2011), a member of a putative class is *not* a party to the case prior to class certification and is *not* bound by litigation events prior to certification.

Plaintiff tries in vain to distinguish *Smith v. Bayer* on the grounds that it involved whether a federal district court could enjoin a state court under the relitigation exception to the Anti-Injunction Act, and involved a circumstance where class certification had been denied in a previous class action. Opp. at 11-12. But this Court's unanimous holding in *Smith v. Bayer* was based, in part, on a principle so basic to

class action law that it cannot be reasonably disputed: absent members of a proposed class are *not* parties, and *cannot* be bound, unless and until a class is certified. As this Court explained:

> Federal Rule 23 determines what is and is not a class action in federal court, where McCollins brought his suit. So in the absence of a certification under that Rule, the precondition for binding Smith was not met. Neither a proposed class action nor a rejected class action may bind nonparties. What does have this effect is a class action approved under Rule 23. But McCollins' lawsuit was never that.

Id. at 2380. As this Court reiterated in the very last sentence of its opinion, "the mere proposal of a class in the federal action could not bind persons who were not parties there." *Id.* at 1282. This basic principle is equally applicable to state courts, which, as a matter of due process, cannot bind putative class members without notice and an opportunity to be heard. *Shutts*, 472 U.S. at 811-12.

Plaintiff also argues that "the decision to stipulate to damages of a certain size is no different from innumerable other decisions that class representatives inevitably make as masters of their complaints," such as deciding which defendants to sue and which causes of action to assert. Opp. at 14. Stipulations of the sort proffered by Plaintiff, however, are fundamentally different because they purport to be binding on the absent members of the putative class and, if

given effect, they eviscerate the right of removal in a manner that no other tactic can accomplish. Other decisions made by a named plaintiff are not binding on the absent putative class members and also can be overcome by a defendant's evidence establishing that the case, as pleaded, implicates a potential recovery of over $5 million. A stipulation, however, if enforced as binding, not only destroys rights of absent, unrepresented persons, but also renders defendants' evidence in support of removal meaningless, as the District Court held. Pet. App. 9. In order for Congress's conferral of a right of removal under CAFA to be meaningful, federal courts must be "equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction." *Wecker v. National Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907).

II. BASED ON AN INTERVENING DECISION, THERE IS NOW A DIRECT CIRCUIT CONFLICT

After the Petition was filed (and before the Opposition was filed), the Tenth Circuit decided a case where the plaintiff's complaint expressly sought less than $5 million on behalf of the putative class. The district court remanded, treating this as a "binding limitation on damages" equivalent to the stipulation in the instant case. *Frederick v. Hartford Underwriters Ins. Co.*, 2012 WL 2443100, *1 (10th Cir. June 28, 2012). The Tenth Circuit reversed. Addressing the circuit split over the burden of proof under CAFA,

it agreed with the Eighth Circuit and majority of circuits applying a preponderance standard. *Id.* at *2. The Tenth Circuit then held, contrary to *Rolwing*, that "a plaintiff's attempt to limit damages in the complaint is *not dispositive* when determining the amount in controversy" because "*[r]egardless of the plaintiff's pleadings*, federal jurisdiction is proper if a defendant proves jurisdictional facts by a 'preponderance of the evidence' such that the amount in controversy may exceed $5,000,000." *Id.* at *3 (emphasis added). *Frederick* is at odds with the decision of the Eighth Circuit in *Rolwing*, which allowed the plaintiff's limitation on damages to control over the defendant's evidence. *Rolwing*, 666 F.3d at 1071-72. *Frederick* also demonstrates how the question presented here is important and recurring, and worthy of certiorari.

III. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW

Plaintiff argues that "[t]he district court applied well-settled law," citing non-class action cases explaining that an individual plaintiff can choose not to plead a claim involving a federal question, or choose to seek for herself an amount less than the diversity jurisdiction threshold (currently $75,000) in order to avoid federal jurisdiction. *See Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002); *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938). Those cases simply do not address the question presented here regarding a named plaintiff's authority to bind absent, unrepresented

persons. Although *United States v. Hohri*, 482 U.S. 64 (1987) was a putative, uncertified class action in which the plaintiffs limited their claims to below $10,000 to achieve district court jurisdiction under the Little Tucker Act, there is no indication in this Court's opinion or the lower court opinions that the plaintiff attempted to limit the damages of the absent members of the putative class, and in any event none of the courts addressed the enforceability of such a limitation. *See also Hohri v. United States*, 586 F. Supp. 769 (D.D.C. 1984), *aff'd in part and rev'd in part*, 782 F.2d 227 (D.C. Cir. 1986). Moreover, prior to CAFA, no such limitation would have been necessary because, if federal jurisdiction existed over the named plaintiffs' individual claims, supplemental jurisdiction then would exist over the putative class members' claims. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 549 (2005).

Plaintiff notes that this Court denied certiorari in *Skechers USA, Inc. v. Tomlinson*, 132 S. Ct. 551 (2011), which involved a stipulation by a named plaintiff purporting to limit the recovery of putative class members to below $5 million. The Eighth Circuit's denial of permission to appeal in *Skechers*, however, was issued before its decision in *Rolwing*, and the district court (ruling prior to *Smith v. Bayer*) had relied upon mere dictum by the Eighth Circuit suggesting that such a stipulation might be enforceable. *See Tomlinson v. Skechers U.S.A., Inc.*, 2011 U.S. Dist. LEXIS 142862, *6-8 (W.D. Ark. May 25, 2011) (relying on *Bell*, 557 F.3d at 958). This Court

might have wished to give the Eighth Circuit an opportunity to squarely address the question presented before granting certiorari. The circuit split also has further developed based on *Frederick*.

Plaintiff argues that his purportedly binding stipulation on behalf of persons he has no authority to represent "serves CAFA's purposes by ensuring that that the damages in this case will be capped at $5 million and will not present the risk of a limitless judgment." Opp. at 21-22. But the purpose of CAFA was *not* to have claims of absent class members artificially limited. Rather, CAFA was expressly intended to "assure fair and prompt recoveries for class members with legitimate claims," Pub. L. No. 109-2, § 2(b)(1), but have such controversies determined in federal court. Congress found that fairness to absent class members as well as defendants would be best achieved by bringing class actions to federal court and thereby eliminating state court abuses of the class action device that often enriched class counsel at the expense of the class. *See id.*, § 2(a)(2)-(4).[1]

Plaintiff also argues that "[n]othing that Congress included in CAFA suggests that a plaintiff

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[1] If Plaintiff were correct that the members of the putative class are bound now by his stipulation, they would have no right to object if, faced with extensive state court discovery (such as the over 100 pages of discovery requests propounded with Plaintiff's Complaint, *see* Pet. App. 53), the defendant agreed to enter into a class settlement consistent with the cap on damages in the stipulation.

bringing a class action is no longer the master of her complaint or is somehow prevented from 'suing for less than the jurisdictional amount.'" Opp. at 22. To the contrary, CAFA mandates that "the claims of the individual class members *shall be aggregated*" to determine the amount in controversy, 28 U.S.C. § 1332(d)(6) (emphasis added), and does not allow such aggregation to be defeated by a reduction of the aggregate amount of such claims to under $5 million based on a stipulation of a putative class representative.

IV. THE FACT THAT THE EIGHTH CIRCUIT DECIDED THE QUESTION PRESENTED IN *ROLWING* RATHER THAN THE INSTANT CASE IS IMMATERIAL

Plaintiff contends that certiorari should be denied because "the *Rolwing* case, rather than this one, would be the proper vehicle" for review. Opp. at 8. But the defendant in *Rolwing*, for whatever unknown reason, chose not to seek certiorari. And it is very unlikely that the Eighth Circuit will choose, in its discretion, to decide the same issue it decided in *Rolwing* on the merits in another case. Any subsequent panel of the Eighth Circuit would be bound by *Rolwing*. *See Brock v. Astrue*, 674 F.3d 1062, 1065 (8th Cir. 2012). Thus, the *only* way that the holding in *Rolwing* can be corrected (absent *en banc* review, which was denied below) is by this Court granting certiorari in this case or another case with a similar procedural posture.

While Plaintiff suggests that this Court never reviews a case where there was no appellate decision below, that is incorrect. Just last Term, the Court granted certiorari and reviewed an order of a state trial court where both the court of appeal and state supreme court had denied review. *Smith v. Cain*, 132 S. Ct. 627, 630 (2012); *see also Sears v. Upton*, 130 S. Ct. 3259, 3261 (2010); *Norfolk & Western Ry. v. Ayers*, 538 U.S. 135, 144 (2003).

V. THE ISSUE PRESENTED IS NOT PREMATURE

Plaintiff argues that this Court can decide this case on a petition for certiorari from a final decision of the Arkansas Supreme Court. Opp. at 8-10. Plaintiff's argument, however, is not that this Court would decide federal jurisdiction at that stage. Rather, Plaintiff suggests that this Court would decide whether hypothetical determinations by the state trial and appellate courts that Plaintiff was an adequate class representative, notwithstanding his stipulation, comported with federal due process requirements. That is a different question that would not necessarily resolve whether federal jurisdiction existed. Moreover, even if this Court could revisit whether federal jurisdiction existed after a state court trial and appeal, it is unlikely this case would reach that stage. All of the previous putative class actions filed by Plaintiff's counsel in the Miller County Circuit Court settled before certification. *See* Pet. at 5. If, as Plaintiff suggests, a class were certified, it is well-recognized that

"[c]ertification as a class action can coerce a defendant into settling on highly disadvantageous terms regardless of the merits of the suit." *CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 723 (7th Cir. 2011) (Posner, J.). This is especially true in a class action that is limited to $5 million because, if the case is litigated all the way through discovery, class certification and trial, the costs of such litigation are likely to equal, if not exceed, the amount in controversy.

Plaintiff also argues that the state court should decide, at class certification, whether the stipulation is fair to absent class members and, if it is not, Plaintiff could be deemed an inadequate class representative. Opp. at 9. This argument, however, is inconsistent with Plaintiff's position and the District Court's conclusion that the stipulation binds the absent putative class members *now*. If the stipulation is binding on the putative class members now, it could not be revisited at class certification (and class members could not opt out of it). Alternatively, if the stipulation is *not* binding now, it cannot defeat Standard Fire's evidence and establish, to a "legal certainty," that the amount in controversy *now* is below $5 million. *Bell*, 557 F.3d at 956.

Plaintiff also notes that Standard Fire could remove this case again if developments in state court demonstrate that the amount in controversy exceeds $5 million. Opp. at 10-11. But to allow the use of a non-binding stipulation to defeat defendants' right of removal, and require defendants to wait until a

potentially much later stage of the litigation before being entitled to removal, not only would waste substantial resources in both state and federal court systems and improperly eviscerate defendants' rights under CAFA, it also would fly in the face of the well-established proposition that federal jurisdiction exists if the amount in controversy at the time of removal satisfies the jurisdictional threshold. *St. Paul Mercury*, 303 U.S. at 293. Moreover, it might not become apparent that the aggregate damages will exceed $5 million until a class has been certified and a jury verdict has been rendered.[2] As discussed above, Standard Fire will also have faced substantial pressure to settle before then.

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[2] Arkansas court rules allow a judgment in excess of the amount demanded, Ark. R. Civ. P. 54(c); *Grytbak v. Grytbak*, 227 S.W.2d 633, 635-36 (Ark. 1950), and also allow amendments to pleadings to conform to the evidence after trial. Ark. R. Civ. P. 15(b); *Myers v. Yingling*, 279 S.W.3d 83, 90 (Ark. 2008). Plaintiff's carefully worded stipulation, which attempts to limit only the damages he and the putative class will "seek" and not the damages they will accept, does not rule out a verdict for more than $5 million and the quagmire of novel issues that would result from a removal post-verdict.

CONCLUSION

The petition for a writ of certiorari should be granted.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEF

SUPREME COURT, U.S.
FILED
JUN 29 2012
OFFICE OF THE CLERK

No. 11-1450

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The Standard Fire Insurance Company,
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Individually and as Class Representative on Behalf of all Similarly Situated Persons Within the State of Arkansas,
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On Petition for a Writ of Certiorari
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The Center for Class Action Fairness (the "Center"), by and through the undersigned counsel, by consent of the parties, submits this brief *amicus curiae* respectfully praying that the Court grant the Petitioner a writ of certiorari.* In support of the petition, the Center states as follows:

Interest of the Amicus

The Center is a non-profit organization that provides legal representation in support of consumers and for the public benefit of fair and reasonable class action lawsuit settlements. The purpose of the Center is to provide *pro bono* representation to consumers and shareholders aggrieved by class action attorneys who negotiate settlements and conduct litigation that benefit themselves at the expense of their putative clients. Litigation on behalf of consumers by attorneys affiliated with the Center has been covered by the *Wall Street Journal*, *Forbes*, the *National Law Journal*, and the *ABA Journal*, among others. Unlike so-called "professional objectors" that threaten to disrupt a settlement in order to extract a share of plaintiffs' attorneys' fees, the Center makes no effort to engage in *quid pro quo* settlements for profit. *See* Paul Karlsgodt & Raj Chohan, *Class Action Settlement Objectors: Minor Nuisance or Serious*

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* Pursuant to Sup. Ct. R. 37.6, the Center certifies that no counsel for either party authored any part of this brief and that no person, other than the *amicus* and its counsel, made a monetary contribution intended to fund the preparation of the brief. The Center certifies consistent with Sup. Ct. R. 37.2(a) that counsel of record for both parties have been notified more than ten days before filing of the *amicus'* intention to file the brief and have given their consent.

Threat to Approval, BNA: Class Action Lit. Report, Aug. 12, 2011 (distinguishing Center from for-profit "professional objectors"). Instead, the Center's attorneys—who have never agreed to withdraw an objection in exchange for payment—represent consumers by objecting to unfair settlements that do not provide meaningful relief to class members and by seeking court rulings that protect consumers from self-serving class action attorneys. *E.g., In re Classmates.com Consolidated Litig.*, No. 2:09-cv-00104-RAJ, slip op. at 16 (W.D. Wash. Jun. 15, 2012) (slip op.)(noting Center "was relentless in [its] identification of the numerous ways in which the proposed settlements would have rewarded class counsel (and a *cy pres* charity) at the expense of class members" and "significantly influenced the court's decision to reject the first settlement and to insist on improvements to the second"). As a result, the Center can offer this Court a unique perspective on how review of this case serves the interests of absent class members.

The Center's work also makes it especially familiar with cases where class attorneys looking out for their own interests abuse class litigation and settlements at the expense of their putative clients. The unfair settlements the Center has fought are not isolated cases: Indeed, both economic theory and empirical evidence indicate a significant number of class actions leave consumers without meaningful relief. Given its commitment to helping consumers, the Center has a strong interest in seeing the Court review the decision below, which rests upon the untenable assumption that before certification, the proposed class representative may limit the recovery of the absent class members to achieve his attorneys' short-term goals.

Summary of the Argument

The Court should grant a writ of certiorari in this case because it would clarify the fiduciary duties class-action attorneys owe to absent class members. This case also merits certiorari because the *status quo* permits class action attorneys to forum shop for jurisdictions that do not afford federal Rule 23 protections. Further, if allowed to stand, class counsel may effectively shield involving national classes from removal to federal court cases in contravention of the purposes of the Class Action Fairness Act.

Reasons Why a Writ Should be Granted

I. THE LEGITIMACY OF BINDING STIPULATIONS HAS IMPORTANT IMPLICATIONS FOR THE FIDUCIARY DUTY THAT CLASS COUNSEL OWE TO CLASS MEMBERS.

Federal courts recognize that the class-action attorney owes a fiduciary duty to absent class members that begins as soon as he files a complaint seeking class-action status. *Jones v. GN Netcom, Inc.*, 654 F.3d 935, 946 (9th Cir. 2011)(noting counsel's fiduciary duty to class); *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 279 (7th Cir. 2002) (Posner, J.)(same); *Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1327 (9th Cir. 1999)(same). Allowing the named plaintiff to bind the entire class to relief less than $5 million, when class members have claims for more than that, conflicts with the fiduciary duty to seek the maximum possible recovery on behalf of the class. Indeed, the Court of Appeals for the Fifth and Seventh Circuits,

which have prohibited binding stipulations of this type, did so because enacting the stipulation violates the named plaintiff's fiduciary duty to the class. *Back Doctors Ltd. v. Metropolitan Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830-31 (7th Cir. 2011) (Easterbrook, J.)("Back Doctors has a fiduciary duty to its fellow class members ... What Back Doctors is willing to accept thus does not bind the class and therefore does not ensure that the stakes fall under $5 million."); *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 724 (5th Cir. 2002)("It is improbable that Manguno can ethically unilaterally waive the rights of the putative class members to attorney's fees without their authorization.").

This tension provides another, independent reason for review. Review of the case below would offer direction to lower courts about the nature and extent of the fiduciary duty that class counsel owe to a class. Scholarship has documented the fact that class-action attorneys do not just recruit class representatives, but in fact seek out prospective named plaintiffs over whom they can exert the maximum amount of control. *See* Stephen Meili, *Collective Justice or Personal Gain?: An Empirical Analysis of Consumer Class Action Lawyers & Named Plaintiffs*, 44 Akron L. Rev. 67, 111 (2011)("given that class action lawyers often have the luxury of selecting named plaintiffs who are willing to align their goals with the attorneys, this power is more pronounced in class actions than in individual cases, where the client normally chooses the lawyer"); *see also, e.g., In re Monster Worldwide, Inc. Sec. Lit.*, 251 F.R.D. 132, 136 (S.D.N.Y. 2008)(criticizing proposed lead plaintiff that "has no interest in, genuine knowledge of, and/or meaningful involvement in this case and is simply the willing pawn of counsel").

For example, in *In re Motor Fuel Temperature Sales Pract. Lit.*, 271 F.R.D. 263, 281-84 (D. Kan. 2010), the district court rejected a settlement that paid $0 to the class because there were no class representatives of important subclasses. The plaintiffs simply recruited subclass representatives who agreed to support the identical $0 settlement and resubmitted it to the court. *See id.*, No. 07-MD-1840-KHV, 2012 U.S. Dist. LEXIS 57 981, *72-74 (D. Kan. Apr. 24, 2012).

Given the tension between the best interests of class members and the financial best interests of the class attorneys, outlining the precise boundaries of the attorneys' fiduciary duty to the members of their proposed class becomes critically important.

II. THE RIGHTS OF CLASS MEMBERS IN A NATIONWIDE CLASS SHOULD NOT DEPEND ON THE JURISDICTION IN WHICH THEIR ATTORNEY BRINGS THE CASE.

The protections afforded by Rule 23 of the Federal Rules of Civil Procedure as well as the CAFA statute itself are critical to ensuring that the rights of unnamed class members are adequately protected in nationwide class actions. Indeed, CAFA explicitly states that it was passed to "assure fair and prompt recoveries for class members with legitimate claims," to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction," and prevent "abuses of the class action device that have harmed class members." 28 U.S.C. § 1711 note §§ 2(a)(2)(A), (b)(1), (b)(2). Rule 23 further exists to protect the due process rights of those class members who never

appear before the court. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1751 (2011)("For a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class.").

Unlike the federal courts, the state of Arkansas does not have the same concerns about due process when presiding over class actions. For example, it expressly refuses to require its courts to exercise rigorous scrutiny when certifying class actions. *See, e.g., Simpson Housing Solutions, LLC v. Hernandez*, 2009 Ark. 480, 2009 Ark. LEXIS 660, *21 (2009)("the federal courts apply a rigorous analysis test for class actions, which this court has consistently rejected"). Nor, unlike in federal court, may an unnamed class member appeal the approval of a settlement if the lower court rejects her request to intervene. *Compare Ballard v. Advance Am.*, 349 Ark. 545, 548, (2002) *with Devlin v. Scardelletti*, 536 U.S. 1 (2002) *and Robert F. Booth Trust v. Crowley*, No. 10-3285, 2012 U.S. App. LEXIS 11927 (7th Cir. June 13, 2012)(Easterbrook, J.)(district courts should free grant intervention rights to objectors to preserve their appellate rights). Arkansas is not alone in providing lesser protections to class members. New Jersey for example, has lesser notice requirements than those of the federal rules. See N.J. R. Civ. P. 4:32-2(b)(2). And California and Missouri, unlike federal courts, leaves the approval of coupon settlements entirely to the discretion of the trial-court judge. *Nordstrom Com'n Cases*, 186 Cal. App. 4th 576, 591 (2010)(approving coupon settlement as not an abuse of discretion because California courts do not disfavor coupon settlements); *Bachman v. A.G.*

Edwards, 344 S.W.3d 260, 2011 Mo. App. LEXIS 730, *12-13 (2011) (same, Missouri courts); *see also* Dan Fisher, *St. Louis Judge Hands Lawyers $21 Million For Coupons*, Forbes.com, Jun. 23, 2010. By contrast, federal courts subject these settlements to higher scrutiny because of the potential for abuse by counsel. *See, e.g., Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 654 (7th Cir. 2006)("CAFA required heightened judicial scrutiny of coupon-based settlements based on its concern that in many cases 'counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value.'")

So long as the status of remands like these remain unresolved, the protections consumers enjoy under CAFA—including the right to be free from coupon settlements that provide no value to class members—could depend entirely on the circuit in which the action is filed. Consumers in Illinois or Mississippi would wind up as class members in federal court, subject to the protections afforded by Federal Rule of Civil Procedure 23 and CAFA, and entitled to recover the full range of remedies available to them. Meanwhile, consumers in Arkansas, New Jersey, or California would instead find themselves in state court, without these same due process protections, and with only the *pro rata* share of the $4,999,999.99 that their class representative chose to seek on their behalf. This sort of inconsistent treatment of consumers is exactly the kind that this Court is best equipped to address.

This is not an abstract concern. Courts—including this one—have long recognized that forum shopping is a common practice and cause for concern in class-action litigation. *See, e.g., Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1447 (2010)(forum shopping "unacceptable

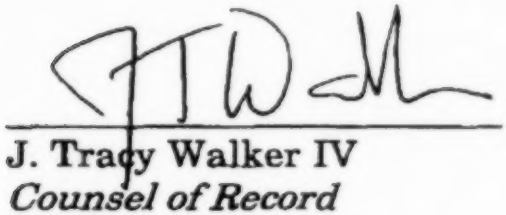
when it comes as the consequence of judge-made rules created to fill supposed 'gaps' in positive federal law."). Indeed, one of the motivations for passing the Class Action Fairness Act was to reduce, if not eliminate, the problematic effects of forum shopping in class actions. *See, e.g.*, S. Rep. No. 109–14, at 13–23; 151 Cong. Rec. S1225, S1228 (daily ed. Feb. 10, 2005) (statement of Sen. Orrin Hatch); 151 Cong. Rec. H723, S726 (daily ed. Feb. 17, 2005)(statement of Rep. F. James Sensenbrenner); 151 Cong. Rec. S999-02, S999 (daily ed. Feb. 7, 2005)(statement of Sen. Arlen Specter).

And, at this point, established scholars who are critics of this Court's rulings in cases like *Wal-Mart Stores, Inc. v. Dukes* and *AT&T Mobility LLC v. Concepcion* have taken to explicitly advising plaintiffs' attorneys to choose fora where the federal "rigorous analysis" will not be an obstacle to their litigation strategies. Robert H. Klonoff, *The Decline of Class Actions,* 90 WASH. U. L. REV. ____, Draft at 72 (2013)(draft available at http://ssrn.com/abstract=2038985)(recommending forum shopping to "avoid adverse precedent"). To the extent that plaintiffs' counsel deliberately limit recovery to absent class members in order to avoid the protections that Rule 23 affords to absent class members, they have added injury to injury. Resolving this split among the circuits would properly restore the focus of Rule 23 where it belongs: on the best interests of the members of the class.

Conclusion

For these reasons, your amicus respectfully urges the Court to grant a writ and promptly decide these important questions.

Respectfully Submitted,



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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 11-1450

Supreme Court, U.S.
FILED
JUL 2 2012
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

THE STANDARD FIRE INSURANCE COMPANY,
Petitioner,

v.

GREG KNOWLES, INDIVIDUALLY AND AS CLASS REPRESENTATIVE ON BEHALF OF ALL SIMILARLY SITUATED PERSONS WITHIN THE STATE OF ARKANSAS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a class action that is removed under the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4, may be remanded solely on the ground that a would-be named plaintiff purports to waive any recovery for the class above CAFA's $5 million jurisdictional threshold.

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IN THE

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from

every region of the country.[1] The Chamber represents the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the Nation's business community.

This case presents a question of vital importance to the Chamber's members which divides the federal courts: whether a putative class representative may evade the protections of the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, §4, 119 Stat. 4, 9-12—a law intended to guarantee a federal forum for significant class actions—by offering a stipulation purportedly waiving for herself and absent class members any recovery above CAFA's $5 million jurisdictional threshold. Many of *amicus*'s members have first-hand experience in state-court systems that refuse to subject proposed classes to anything like the meaningful scrutiny required under Federal Rule of Civil Procedure 23, and which employ procedural devices that can encourage nuisance litigation and force defendants to settle meritless claims. Because there is no vehicle that allows consolidation of related class actions in different States' courts (as exists, for example, under the federal multi-district litigation statute, see 28 U.S.C. §1407(a)), many of the Chamber's mem-

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund this brief's preparation or submission. Pursuant to Supreme Court Rule 37.2, *amicus curiae* states that counsel of record for both petitioner and respondent were timely notified of the intent to file this brief; the parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

bers have also been forced to shoulder the burden of simultaneously defending against a litany of overlapping class actions in state courts throughout the country.

Amicus has advocated strongly against abusive state class-action procedures. The Chamber was an early and vocal supporter of CAFA's enactment, and it has filed briefs on CAFA issues in this and other courts seeking to fulfill CAFA's guarantee of a federal forum for important class actions. *E.g.*, *Gay* v. *Morgan*, No. 06-1471, cert. denied, 552 U.S. 940 (2007); *Skechers U.S.A., Inc.* v. *Tomlinson*, No. 11-287, cert. denied, 132 S. Ct. 551 (2011). *Amicus* and its members thus have both a unique perspective on the question presented and a substantial interest in ensuring that CAFA's requirements are interpreted and enforced consistent with its purpose.

REASONS FOR GRANTING THE PETITION

This case raises an issue of exceptional importance to class-action defendants and absent class members. In enacting CAFA, Congress recognized that widespread "abuses of the class action device" in state courts had "harmed class members with legitimate claims and defendants that ha[d] acted responsibly." Pub. L. No. 109-2, § 2(a)(2), 119 Stat. 4, 4. It likewise recognized that such abuses damage interstate commerce and undermine respect for the judicial system. *Id.* §§ 2(a)(2)(B)-(C), (4)(C), 119 Stat. 4, 4-5. CAFA therefore allows putative class actions to be removed to federal court, giving them the benefit of federal procedural protections, when more than $5 million is at issue.

Under the announced approach of the Eighth Circuit applied in this case, putative class representatives and their counsel may nullify CAFA's protections and defeat federal jurisdiction simply by signing a stipulation purporting to limit class recovery to $5 million or less; doing

so forces a remand to state court. That "automatic remand" rule invites the forum-shopping that Congress intended to stop by enacting CAFA. Putative lead plaintiffs and attorneys seeking to avoid federal jurisdiction in the future will invariably bring suit in those States within circuits that consider damages stipulations dispositive of CAFA's amount-in-controversy test, particularly in a select few counties notoriously hostile to class-action defendants. Absent this Court's review, the untenable regime before CAFA's enactment—where courts in a few "magnet" jurisdictions purported to bind the rights of other States' residents, effectively making policy for the Nation on significant issues—will not merely reappear but expand as well.

The Eighth Circuit's approach, moreover, prejudices the rights of plaintiffs and defendants alike and harms the public interest. Absent class members may find their individual recoveries reduced to a pittance based on a stipulation by a putative representative of undetermined adequacy. Defendants who try to settle such suits will be inevitably confronted by dissatisfied absent class members challenging any resulting settlement's enforceability under both state law and the federal Constitution. The Eighth Circuit's approach also inevitably produces splinter litigation spurred by the desire of absent class members to opt out where settlements are reduced by damage stipulations. The only beneficiaries of the chaos caused by the automatic remand rule are named plaintiffs and their counsel.

I. THE DECISION BELOW RAISES ISSUES OF VITAL IMPORTANCE TO THE NATION'S BUSINESS COMMUNITY

The question presented is of vital importance to the thousands of businesses confronted by class action litiga-

tion. Congress enacted CAFA to protect class-action defendants from arbitrary, opportunistic, and abusive forum-shopping in the state courts. Allowing a plaintiff's lawyer to evade CAFA through a stipulation purporting to limit damages artificially is directly contrary to that goal. The Eighth Circuit's approach threatens businesses across this Nation with the very problems CAFA sought to avoid.

A. Stipulating Damages To Evade CAFA Jurisdiction Encourages "Magnet Jurisdictions"

In drafting CAFA, Congress expanded federal jurisdiction over class actions to prevent the systematic abuse of the class-action procedure in state courts. The rule adopted by the court below effectively nullifies a key component of that effort.

1. Before CAFA was enacted, class-action plaintiffs regularly flocked to a small number of "magnet" jurisdictions with little or no connection to the nationwide claims they alleged. S. Rep. No. 109-14, at 13 (Feb. 28, 2005); see 151 Cong. Rec. 1551-1552 (Feb. 7, 2005) (statement of Sen. Frist). That concentration of lawsuits meant that a few courts would make important policy decisions for the rest of the country, "bind[ing] the rights of the residents of [other] States." Pub. L. No. 109-2, §2(a)(4)(C), 119 Stat. 4, 5; see also 151 Cong. Rec. 2636 (Feb. 17, 2005) (statement of Rep. Sensenbrenner) (noting that "[a] major element of the worsening crisis is the exponential increase in State class action cases in a handful of 'magnet' or 'magic' jurisdictions"). Unsurprisingly, the most "magnetic" courts are also the ones most willing to certify class actions with minimal scrutiny. S. Rep. No. 109-14, at 22-23 (describing how magnet courts easily certify significant class actions, even those already rejected as unsuitable for class treatment by federal or other state

courts); 151 Cong. Rec. 2071 (Feb. 10, 2005) (statement of Sen. Vitter) ("There is now in our country a full blown effort aimed at mining for jackpots in sympathetic courts known as 'magnet courts' for the favorable way they treat [class-action] cases.").

This case arises out of one of those "magnet jurisdictions"—the Circuit Court of Miller County, Arkansas. Pet. App. 15; Nan S. Ellis, *The Class Action Fairness Act of 2005: The Story Behind The Statute*, 35 J. Legis. 76, 95 & n.115 (2009) ("The most famous magnet jurisdictions are Madison County, Illinois and Miller County, Arkansas."). Indeed, the American Tort Reform Foundation named Miller County as a potential "judicial hellhole" given its courts' propensity to "unfair rulings" and "large awards," noting that the county has more tort cases *per capita* than any other county in the State. Am. Tort Reform Found., *Judicial Hellholes 2006*, at v, 22 (2006), available at http://bit.ly/LE8gxJ.

2. To discourage "magnet jurisdictions" and the forum-shopping they produce, CAFA creates federal jurisdiction for class actions "in which the matter in controversy exceeds the sum or value of $5,000,000." 28 U.S.C. §1332(d)(2). The statute goes on to clarify that "the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000," *id.* §1332(d)(6), "abrogat[ing] the [prior] rule against aggregating claims," *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 571 (2005).

Congress intended courts making that calculation to read CAFA's provisions "broadly" in favor of a federal forum. See, *e.g.*, S. Rep. No. 109-14, at 43 (Feb. 28, 2005) ("[N]ew section 1332(d) is intended to expand substantially federal court jurisdiction over class actions. Its

provisions should be read broadly, with a strong preference that interstate class actions be heard in a federal court if properly removed by any defendant."); 151 Cong. Rec. 2637 (Feb. 17, 2005) (statement of Rep. Sensenbrenner) ("[I]f a Federal court is uncertain about whether the $5 million threshold is satisfied, the court should err in favor of exercising jurisdiction * * * ."); see *id.* at 2640. CAFA's removal provision thus should not be lightly defeated.

Notwithstanding Congress's clear intent, putative class representatives seeking to evade federal jurisdiction now regularly stipulate to limit damages to less than $5 million—to the apparent detriment of both named and potential class members who forfeit possible recovery and to the obvious detriment of the federal supervision over class actions that CAFA was designed to establish. Unsurprisingly, the Eighth Circuit's practice of reflexively remanding on the basis of such "stipulations" has allowed "magnet jurisdictions" to flourish. District courts in that circuit, for instance, have repeatedly ordered remand to state courts in recent years based on damages stipulations.[2] The frequency of such remands

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[2] See *Oliver* v. *Mona Vie, Inc.*, No. 11 Civ. 4125, 2012 WL 1965613, at *3 (W.D. Ark. May 31, 2012); *Smith* v. *Am. Bankers Ins. Co. of Fla.*, No. 11 Civ. 2113, 2011 WL 6090275, at *5-7 (W.D. Ark. Dec. 7, 2011); *Knowles* v. *Std. Fire Ins. Co.*, No. 11 Civ. 4044, 2011 WL 6013024, at *6 (W.D. Ark. Dec. 2, 2011); *McClendon* v. *Chubb Corp.*, No. 11 Civ. 2034, 2011 WL 3555649, at *10 (W.D. Ark. Aug. 11, 2011); *Thompson* v. *Apple, Inc.*, No. 11 Civ. 3009, 2011 WL 2671312, at *2 (W.D. Ark. July 08, 2011); *Murphy* v. *Reebok Int'l, Ltd.*, No. 11 Civ. 214, 2011 WL 1559234, at *3 (E.D. Ark. Apr. 22, 2011); *Tuberville* v. *New Balance Athletic Shoe, Inc.*, No. 11 Civ. 1016, 2011 WL 1527716, at *2 (W.D. Ark. Apr. 21, 2011); *Harris* v. *Sagamore Ins. Co.*, No. 08 Civ. 109, 2008 WL 4816471, at *2-3 (E.D. Ark. Nov. 3, 2008); *Dowell* v. *Debt Relief Am., L.P.*, No. 07 Civ. 39, 2007 WL 2907881, at *3 (E.D. Mo. Oct. 3, 2007).

has risen dramatically since the Eighth Circuit first suggested in *dicta* that a damages stipulation could defeat CAFA diversity jurisdiction. *Bell* v. *Hershey Co.*, 557 F.3d 953, 958 (8th Cir. 2009). Its more recent opinion explicitly approving such stipulations, *Rolwing* v. *Nestle Holdings, Inc.*, 666 F.3d 1069, 1072 (8th Cir. 2012), can only encourage that trend.

Congress explicitly stated in CAFA's preamble that its goal was, in part, to "provi[de] for Federal court consideration of interstate cases of national importance under diversity jurisdiction." Pub. L. 109-2, § 4(b)(2), 119 Stat. 4, 5. Yet the Eighth Circuit's automatic-remand rule encourages deliberate efforts to frustrate federal jurisdiction, thereby undermining two of CAFA's central goals. Systematic evasion of the federal courts prevents the uniform and unbiased treatment of class actions, as would-be lead plaintiffs instead file only in the state courts most predisposed to their claims. S. Rep. No. 109-14, at 4 (describing how state courts often apply procedural rules inconsistently); 151 Cong. Rec. 1554 (Feb. 7, 2005) (statement of Sen. Specter) (class-action reform was meant to "prevent judge shopping to [forums with] a prejudicial predisposition on cases"). And the availability of "magnet jurisdictions" undermines Congress's attempt in CAFA to improve the quality of decision-making in class-action suits. State judges often lack law clerks or other support and can be "simply overwhelmed" by large and complex class-action cases. S. Rep. No. 109-14, at 14. Federal judges, by contrast, enjoy the use of clerks and special masters as needed. *Ibid.* A broad interpretation of CAFA's removal provisions is crucial to ensure that nationwide class actions can be handled both efficiently and fairly for all concerned.

Indeed, the automatic remand rule—remanding whenever the class representative or his counsel promises to limit the recovery—sets CAFA on its head. CAFA contains a variety of provisions mandating heightened review of *settlements* in federal court to ensure that class representatives and their counsel do not enrich themselves at the expense of absent class members.[3] But the automatic remand rule allows putative class representatives to stipulate away damages otherwise awardable to absent class members for nothing more than the chance of evading federal jurisdiction and, with it, the protections federal law would provide. Congress surely could not have intended that *settling* a case for a *guarantee* of 50 cents on the dollar would require compliance with extensive procedural safeguards, but signing a stipulation that gratuitously limits damages to a maximum of 40 cents (or 5 cents) on the dollar to avoid federal jurisdiction is permitted on the putative lead plaintiff's or counsel's unreviewable whim.

Congress, of course, established the $5 million amount-in-controversy requirement to limit the option of removal to putative class actions of sufficient magnitude. But artificial attempts to disfigure the case by anticipatorily amputating part of the recovery just to avoid federal jurisdiction does not undermine the case's importance. To the contrary, as explained below, it is far from

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[3] See 28 U.S.C. § 1712 (imposing limits on contingent fees and other attorney's fee awards in so-called "coupon settlements"); *id.* § 1713 (prohibiting a court from approving a settlement that would cause a net loss to any class member, unless the court finds in writing that nonmonetary benefits to that class member substantially outweigh the monetary loss); *id.* § 1714 (prohibiting class settlements that discriminate against class members based on geographic proximity to the court); *id.* § 1715 (requiring notification of appropriate State and federal officials).

clear that such stipulations even limit the defendants' exposure, given constitutional and ordinary class-action principles. See pp. 10-15, *infra*. And such artificial efforts actually *increase* defendants' litigation risk. See pp. 15-17, *infra*. If the protections of CAFA are to be given their proper effect, this Court's review is warranted.

B. Allowing Damages Stipulations To Defeat Federal Jurisdiction Imposes Intolerable Uncertainty In Contravention Of This Court's Precedents

The Eighth Circuit's decision does not merely promote the very "magnet jurisdictions" Congress sought to eliminate. It removes cases from federal cognizance despite intolerable uncertainty about the true amount that will be in controversy, in violation of this Court's precedents.

In *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283 (1938), this Court held that a party seeking to defeat federal diversity jurisdiction by limiting the amount in controversy must demonstrate "to a *legal certainty*" that the plaintiff could not recover above the jurisdictional threshold. *Id.* at 289 (emphasis added); see also *id.* at 292 ("removal will be futile and remand will follow" where "it is *obvious* that the suit cannot involve the necessary amount" (emphasis added)). The Court so held even though, at least with respect to the diversity statute at issue there, it was the "intent of Congress drastically to restrict federal jurisdiction." *Id.* at 288.

In enacting CAFA, Congress acted to *expand* federal jurisdiction over class actions. See pp. 6-7, *supra*. As a result, CAFA must be construed to demand at least the same degree of legal certainty that this Court required in *St. Paul Mercury*. Thus, to the extent a stipulation purports to limit class-wide damages and thereby defeat

CAFA jurisdiction, the defendant at least should be permitted to insist on proof to a legal certainty that the stipulation will bind the entire class.[4]

Even setting aside case-specific defects in the stipulation at issue here,[5] the district court conducted no meaningful analysis of the stipulation's enforceability. For example, due process requires additional safeguards in class actions to ensure adequate representation and to protect the interests of absent class members. The Fifth and Seventh Circuits thus have indicated that a named plaintiff's ethical and fiduciary duties forbid her from stipulating away class recovery for the sake of defeating jurisdiction. See *Manguno* v. *Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 724-725 (5th Cir. 2002); *Back Doctors Ltd.* v. *Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830-831 (7th Cir. 2011) (Easterbrook, C.J.); pp. 20-21, *in-*

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[4] The relevant degree of certainty and who bears the burden of proof have created an open and acknowledged conflict in the courts of appeals. *Frederick* v. *Hartford Underwriters Ins. Co.*, No. 12-1611, slip op. at 5 (10th Cir. June 28, 2012). For example, the Tenth Circuit requires that, once a defendant shows a sufficient amount in controversy by a preponderance of the evidence, *plaintiffs* must prove that it is *impossible* for them to hit the jurisdictional threshold. *Id.* at 8-9. The Seventh Circuit agrees. *Back Doctors Ltd.* v. *Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830 (7th Cir. 2011) ("[T]he estimate of the dispute's stakes advanced by the proponent of federal jurisdiction controls unless a recovery that large is legally impossible."). By contrast, the Third and Ninth Circuits require the opposite: *Defendants* must "prove with legal certainty that the amount in controversy is satisfied." *Lowdermilk* v. *U.S. Bank Nat'l Ass'n*, 479 F.3d 994, 996 (9th Cir. 2007) (quotation marks omitted); see also *Morgan* v. *Gay*, 471 F.3d 469, 475 (3d Cir. 2006), cert. denied, 552 U.S. 940 (2007). That conflict of authority, implicated here, weighs in favor of review.

[5] In this case, the district court ruled the stipulation sufficient even though it merely bound counsel to avoid *seeking* more than $5 million. Pet. App. 10-11. But a limit on what counsel *seeks* does not necessarily limit what a sympathetic court might award.

fra. Whether that prohibition applies in all cases is unclear; there may be situations where a properly appointed class representative might reasonably decide that the benefits to the entire class of litigating in state court outweigh the costs of a damages stipulation. But if that stipulation is to be given jurisdictional effect, the federal court would at the very least have to consider a host of due-process implications bearing on whether its enforcement is certain. It would have to consider whether the interests of absent class members "are in fact adequately represented by parties who are present." *Hansberry* v. *Lee*, 311 U.S. 32, 42-43 (1940). It would have to consider whether the potential conflicts of interest between the named plaintiff and her supposed constituents, see *id.* at 44—such as her ability to escape the limits on damages she set for the class by accepting "incentive payments" in settlement—are so great that the class was not, in fact, adequately represented at all. But neither the district court nor the court of appeals considered any of that here.

Moreover, where (as here) the stipulation is signed on behalf of a *putative* class representative—a plaintiff not yet certified as the *actual* representative of absent class members—her authority to bind putative class members is uncertain at best. Indeed, invoking *Smith* v. *Bayer Corp.*, 131 S. Ct. 2368 (2011), petitioner insists that "in the absence of certification," a "proposed class action" cannot bind non-parties such as absent class members. See Pet. 11 (citing *Smith*, 131 S. Ct. at 2380, 2382)). Given that, and the inherent uncertainty of litigation, at the time of removal it may be impossible for a court to conclude with the requisite "legal certainty" that any

stipulation the lead plaintiff signs will in fact bind her would-be class.[6]

C. The Remand Rule Threatens To Deter Settlement And Spawn Satellite Litigation

The rule applied below also deters settlement, spawns litigation about the consequences of former litigation, and promotes serial lawsuits. It is no secret that the vast majority of class-action suits settle. But the risk that a damages stipulation or settlement might prove unenforceable impedes voluntary dispute resolution. In ordinary cases, the risk of follow-on lawsuits asserting the same claims is minimized by the *res judicata* effect of a judgment approving the class-action settlement. But courts have held that "a class action judgment will not bind absent members if they were not accorded due process of the law," and "[t]he preclusive effect of a prior judgment will depend upon whether absent members

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[6] Ironically, courts permitting putative class representatives to stipulate away a portion of the potential class recovery have invoked *St. Paul Mercury* for that result. But *St. Paul Mercury* concluded that a plaintiff may limit *his own* claims if he "does not desire to try his case in the federal court," even "though he would be justly entitled to more." 303 U.S. at 294. Asserting that "CAFA does not change the proposition that the plaintiff is the master of her own claim," some courts have reflexively engrafted *St. Paul Mercury* onto CAFA removal decisions. *Morgan*, 471 F.3d at 474; cf. *Lowdermilk*, 479 F.3d at 999 (noting that it was "preserv[ing] the plaintiff's prerogative" to limit recovery). But it goes well beyond *St. Paul Mercury* to hold that the plaintiff in a *putative* class action is master of *absent class members'* claims, long before any court has granted her authority as a proper class representative to bind the class. This Court has never extended *St. Paul Mercury* to allow a plaintiff to avoid federal jurisdiction by limiting the rights of other parties not before the court. Other courts have reached the opposite conclusion. See pp. 20-21, *infra*. Congress thus did not enact CAFA against a background presumption that the amount in controversy in a class action is determined solely by the putative class representative's choices.

were 'in fact' adequately represented by parties who are present." *Pelt* v. *Utah*, 539 F.3d 1271, 1284 (10th Cir. 2008). This Court has stated that "other state and federal courts are not required to accord full faith and credit to [a constitutionally deficient] judgment," *Kremer* v. *Chem. Constr. Corp.*, 456 U.S. 461, 482 (1982), and "adequate representation is among the due process ingredients that must be supplied if the judgment is to bind absent class members," *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 388 (1996) (Ginsburg, J., concurring in part and dissenting in part); see also *Taylor* v. *Sturgell*, 553 U.S. 880, 900-901 (2008).

Where the named plaintiff purports to waive some of the class recovery, it is all but inevitable that dissatisfied absent class members represented by counsel seeking greater remuneration will file additional suits after settlement, asserting that they cannot be bound by its terms. Citing the putative class representative's decision to dramatically curtail the class's potential recovery for the sole purpose of avoiding federal jurisdiction, the new plaintiffs are likely to attack the lead plaintiff's representation as inadequate. And it is no answer to suggest that the original court might address those issues when first entering judgment or approving settlement. "It is well settled that the court adjudicating a dispute cannot predetermine the binding effect of its own judgment; that can be tested only in a subsequent suit." 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* §1789, at 554-555 (3d ed. 2005).[7] The Eighth Circuit's approach thus does not

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[7] The Advisory Committee's Note to the 1966 amendment of Rule 23 recognizes as much, noting that a court presiding over a class action should "carefully consider[ ]" the scope of its judgment to better fa-

merely subject defendants to potential liability far exceeding the $5 million cap. It threatens the finality of otherwise concluded class-action litigation and undermines incentives for voluntary resolution. Until this Court resolves the question presented, defendants will be caught in a Catch-22, forced to litigate or settle class-action cases knowing that the outcome might have no preclusive effect on later claims. It is thus impossible to say, at this point in time, that a damages stipulation of the sort at issue here provides the requisite "legal certainty."

D. The Eighth Circuit's Approach Threatens To Foster Splinter Litigation And Undermine The MDL Process

Even beyond the issues of enforceability and collateral attack, the Eighth Circuit's approach burdens defendants with needless splinter litigation. By artificially restricting recovery for remaining class members, the rule vastly increases each class member's incentive to opt out of any possible settlement. That multiplication of lawsuits creates the precise situation class-action settlements are meant to avoid. See, *e.g.*, Mark W. Friedman, Note, *Constrained Individualism in Group Litigation: Requiring Class Members To Make a Good Cause Showing Before Opting Out of a Federal Class Action*, 100 Yale L.J. 745, 754-755 (1990) (explaining that defendants in a class action will grow more reluctant to settle as additional litigants opt out).

Nor is that opt-out risk merely theoretical. The plaintiffs' bar is extraordinarily competitive and responds quickly to perceived litigation opportunities. The circula-

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cilitate *subsequent* consideration of *res judicata* issues. See Fed R. Civ. P. 23 Advisory Comm. Note, 39 F.R.D. 98, 106 (1966).

tion of a notice accompanying a proposed class-action settlement will make it easy for enterprising lawyers to send out blanket solicitations of class members, offering the promise of an uncapped recovery. Several law firms, such as respondent's counsel, already have niche practices of filing class actions accompanied by binding stipulations in circuits that permit them. Pet. 8. If this Court allows that practice to continue, it will only be a matter of time before another group creates a lucrative cottage industry of assembling splinter actions composed of disaffected absent class members.

The resulting costs and consequences are aggravated further by the absence of mechanisms to organize competing claims. Congress relied on the Multidistrict Litigation (MDL) statute to assist in coordinating removed claims. That statute authorizes the Judicial Panel on Multidistrict Litigation to transfer civil actions with common issues of fact "to any district for coordinated or consolidated pretrial proceedings." 28 U.S.C. §1407(a). By coordinating multiple cases in a single forum, the MDL statute permits litigation to progress in an orderly fashion, "prevent[ing] duplication of discovery and eliminat[ing] the possibility of conflicting pretrial rulings." *In re Liquid Carbonic Truck Drivers Chem. Poisoning Litig.*, 423 F. Supp. 937, 939 (J.P.M.L. 1976). Just two Terms ago, this Court recognized the crucial interplay between CAFA and the MDL statute, explaining that "to the extent class actions raise special problems of relitigation, Congress has provided a remedy": CAFA allows removal of "any sizable class action involving minimal diversity," while the MDL statute allows "federal courts [to] consolidate multiple overlapping suits against a single defendant in one court." *Smith* v. *Bayer*, 131 S. Ct. at 2382.

But the MDL statute does not apply to related cases pending in state courts. The rule embraced below thus effectively nullifies the benefits and protections MDL affords to defendants. It allows a plaintiff to do away with the coordination afforded by MDL procedures at will. And it requires defendants to litigate a glut of related class actions in state courts across the Nation.

E. The Decision Below Benefits Named Plaintiffs And Class Counsel At The Expense Of Defendants And Unnamed Class Members

The Eighth Circuit's approach, at bottom, allows putative class representatives to circumvent congressionally imposed protections simply by betraying the class they purport to represent. By stipulating away absent class members' potential recovery, they can deny absent plaintiffs the benefit of federal statutory protections designed to guard against precisely such self-serving behavior. That outcome is perverse. And it also prejudices defendants by denying them the enhanced procedural protections afforded by federal court. The only persons who would benefit from the Eighth Circuit's approach are would-be lead plaintiffs and their counsel.

The impact should not be underestimated. To be sure, putative class representatives and their counsel do purport to waive recovery in excess of $5 million to gain a remand to state court. But such stipulations have become ubiquitous, particularly in courts within the Eighth Circuit. See *supra* p. 7 & n.2. And it is easy to see why. The limitations of a recovery-capping stipulation often represent little sacrifice for class representatives and class counsel. Class representatives can often expect that any decrease in their pro rata share of the capped class award will be offset by incentive payments they could receive from any settlement agreement. See, *e.g.*,

Elisabeth M. Sperle, *Here Today, Possibly Gone Tomorrow: An Examination of Incentive Awards and Conflicts of Interest in Class Action Litigation*, 23 Geo. J. Legal Ethics 873, 875 (2010) (noting that "incentive awards are common in class action settlements").

That class counsel's fees are also limited by the $5 million cap only aggravates the problem: Counsel's fee demands stay the same, but the pot available for paying those fees and compensating the class shrinks. State court procedures on class certification and settlement often lack the rigor of CAFA and Rule 23. And if plaintiffs' counsel sacrifices fees by limiting her clients' recovery, she can make up the difference through filing new lawsuits in bulk. As petitioner notes, see Pet. 8, respondent's counsel has filed dozens of cases with damages supposedly just under $5 million—most of them in Miller County Circuit Court.

II. This Court's Review Is Needed To Ensure CAFA's Uniform Application

In enacting CAFA's removal provisions, Congress recognized that even a few States' inequitable practices could have a national impact—not merely by "adversely affect[ing] interstate commerce" and "undermin[ing] public respect for our judicial system," but also by "making judgments that impose their view of the law on other States and bind the rights of the residents of those States." Pub. L. No. 109-2, §§2(a)(2)(B)-(C), (4)(C), 119 Stat. 4, 4-5. The existing conflict among the inferior federal courts frustrates Congress's efforts to provide consistent jurisdictional rules and to prevent a handful of state courts from wielding outsized influence. This Court's review is needed to resolve that conflict and achieve the uniformity Congress intended.

A. The Circuits Have Reached Inconsistent Results

The courts of appeals are divided on whether a putative class representative may evade federal jurisdiction merely by purporting to stipulate away class members' possible recovery.

Several courts have endorsed the automatic remand rule followed below, affording putative class representatives unbridled discretion to limit the recovery of absent class members for the sole purpose of avoiding the federal courthouse. Although the Eighth Circuit initially endorsed that approach in a single line of dictum,[8] it has since ripened into a clear holding. See *Rolwing*, 666 F.3d at 1072. Three other circuits follow a similar approach. The Ninth Circuit has concluded that class representatives may avoid removal under CAFA by stipulating to limited recovery for absent class members. *Lowdermilk*, 479 F.3d at 999 n.5. In a pre-CAFA case, the Eleventh Circuit held—with no analysis—that a named plaintiff's stipulation that each individual class member would neither request nor accept damages in excess of $75,000 could be given controlling weight on a motion to remand. *Darden* v. *Ford Consumer Fin. Co.*, 200 F.3d 753, 755-756 (11th Cir. 2000). And the Third Circuit has adopted a seemingly extreme version of that approach, remanding even on the basis of a damages limitation that was nonbinding under relevant state law. *Morgan*, 471 F.3d at 476-477.

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[8] See *Bell*, 557 F.3d at 958 ("In order to ensure that any attempt to remove would have been unsuccessful, Bell could have included a binding stipulation with his petition stating that he would not seek damages greater than the jurisdictional minimum upon remand; it is too late to do so now.").

By contrast, the Fifth and Seventh Circuits have taken the opposite view. In *Manguno*, for example, the plaintiff attempted to stave off removal by purporting to waive the class's right to attorney's fees otherwise available to prevailing plaintiffs under state law. 276 F.3d at 721-722. Denying the putative class representative's motion to remand, the Fifth Circuit held that she could not limit the class's recovery in order to evade federal jurisdiction. "[I]t is improbable," the Fifth Circuit reasoned, "that Manguno can ethically unilaterally waive the rights of the putative class members to attorney's fees without their authorization." *Id.* at 724-725. Although *Manguno* predates CAFA, the Fifth Circuit has since made clear that putative class representatives similarly cannot evade CAFA's removal by stipulating away the recovery of absent class members. *Ditcharo* v. *United Parcel Serv., Inc.*, 376 F. App'x 432, 437 (5th Cir. 2010) (denying motion to remand because the proffered stipulation did "not provide [putative class representatives] with the authority to deny other members of their putative class action the right to seek an award greater than $75,000").[9]

The Seventh Circuit reached the same conclusion in *Back Doctors*. Because a lead plaintiff owes a fiduciary duty to her class, the court held that she "can't throw away what could be a major component of the class's recovery" merely to "ensure that the stakes fall under $5 million." 637 F.3d at 830-831. That decision was consistent with the Seventh Circuit's earlier endorsement of

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[9] Unsurprisingly, district courts within the Fifth Circuit have reached the same result. See *Belin* v. *Int'l Paper Co.*, No. 11 Civ. 215, 2011 U.S. Dist. LEXIS 69449, *7-8 (W.D. La. June 28, 2011); *Ditcharo* v. *United Parcel Serv.*, No. 08 Civ. 3648, 2009 WL 211146, at *5 (E.D. La. Jan. 28, 2009); *Pendleton* v. *Parke-Davis*, No. 00 Civ. 2736, 2001 WL 96408, at *4 (E.D. La. Jan. 31, 2001).

the Fifth Circuit's approach in *Manguno*. See *Pfizer, Inc.* v. *Lott*, 417 F.3d 725, 725 (7th Cir. 2005) (Posner, J.) (citing *Manguno*, 276 F.3d at 724).

B. The Circuit Division Encourages Forum-Shopping And Undermines CAFA's Purpose

The very existence of those disparate results defeats Congress's purposes in enacting CAFA. As explained below, the automatic remand rule itself has had that effect, allowing the reproduction of "magnet" jurisdictions, and circumvention of CAFA's protections, in those courts following that erroneous rule. But the current division of authority exacerbates those difficulties. For those seeking to avoid CAFA and pursue their cases in state court without federal intervention, the States within circuits following the automatic remand rule (the Third, Eighth, and Ninth Circuits) have a peculiar magnetism, particularly those States, such as Arkansas, that employ lax class-certification standards. It cannot be that Congress enacted CAFA's uniform rules to eliminate so-called magnet jurisdictions at the state level only to watch new magnet jurisdictions arise because the federal courts are divided on CAFA's application. CAFA cannot serve its important role absent this Court's review.

The conflict also undermines the interest of judicial efficiency and economy. "Nothing is more wasteful than litigation about where to litigate * * *." *Bowen* v. *Massachusetts*, 487 U.S. 879, 930 (1988) (Scalia, J., dissenting). But the current conflict has the unfortunate consequence of producing just such litigation, "eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Hertz Corp.* v. *Friend*, 130 S. Ct. 1181, 1193 (2010). Without a clear, uniform answer to whether and when stipulations purporting to limit class recovery re-

quire remand, state and federal courts across the country will be caught in a game of jurisdictional tug-of-war between parties seeking to litigate in what each views as the more favorable forum.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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JULY 2012

JOINT APPENDIX

RECORD
AND
BRIEFS

OCT 22 2012

No. 11-1450

IN THE

Supreme Court of the United States

THE STANDARD FIRE INSURANCE COMPANY,

Petitioner,

v.

GREG KNOWLES, individually and on behalf of all others similarly situated within the State of Arkansas,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED MAY 30, 2012
CERTIORARI GRANTED AUGUST 31, 2012

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Court of Appeals Docket #: 11-8030 The Standard Fire Insurance Co. v. Greg Knowles **Appeal From:** U.S. District Court for the Western District of Arkansas – Texarkana **Fee Status:** waived	**Docketed:** 12/08/2011 **Termed:** 01/04/2012

Case Type Information:
1) Miscellaneous
2) 1453(c)
3) null

Originating Court Information
District: 0861-4 : 4:11-cv-04044-PKH
Trial Judge: P. K. Holmes, III, U.S. District Judge
Date Filed: 05/18/2011
Date Order/ Judgment:
12/02/2011

Prior Cases:
None

Current Cases:
None

* * *

12/08/2011	PETITION for Permission to Appeal pursuant to 28 U.S.C. Section 1453(c). filed by Petitioner The Standard Fire Insurance Company w/service 12/07/2011 [3857354] [11-8030] (PSA)

* * *

12/16/2011	RESPONSE in opposition to petition for 1453(c) appeal, [3857354-2] filed by Attorney Mr. Richard Eugene Norman for Respondent Greg Knowles , w/service 12/16/2011. [3860387] [11-8030] (REN)
12/20/2011	REPLY to response , [3860387-2], filed by Petitioner The Standard Fire Insurance Company. w/service 12/20/2011. [3861543] [11-8030] (WMA)
12/21/2011	CASE SUBMITTED Ad Panel Submission before Judges Roger L. Wollman, Michael J. Melloy, Lavenski R. Smith in St. Louis [3865546] [11-8030] (SRD)

* * *

01/04/2012	**JUDGMENT FILED** - denying [3857354-2] petition for 1453(c) appeal filed by Petitioner The Standard Fire Insurance Company., DENIED. ROGER L. WOLLMAN, MICHAEL J. MELLOY and LAVENSKI R. SMITH Adp Jan 2012 [3865548] [11-8030] (SRD)
01/04/2012	MANDATE ISSUED. [3865557] [11-8030] (SRD)
01/18/2012	PETITION for enbanc rehearing and also for rehearing by panel filed by Petitioner The Standard Fire Insurance Company w/service 01/18/2012 [3870133] [11-8030] (WMA)

01/24/2012	CLERK LETTER sent notifying that party respondent has an opportunity to respond to [3870133-2]: petition for enbanc rehearing. [3872073] [11-8030] (LMT)
02/03/2012	RESPONSE in opposition to petition for enbanc rehearing, [3870133-2], petition for rehearing by panel, [3870133-3] filed by Attorney Mr. Richard Eugene Norman for Respondent Greg Knowles , w/service 02/03/2012. [3876610] [11-8030] (REN)

* * *

02/06/2012	MOTION to file supplemental brief, filed by Attorney Mr. Wystan M. Ackerman for Petitioner The Standard Fire Insurance Company w/service 02/06/2012. [3876904] [11-8030] (WMA)
02/10/2012	JUDGE ORDER:granting [3876904-2] motion of petitioner to file a reply brief in support of the petition for rehearing en banc filed by Mr. Wystan M. Ackerman. Adp Dec 2011 [3878803] [11-8030] (LMT)
02/10/2012	REPLY brief in support of petition for enbanc rehearing, [3870133-2], filed by Petitioner The Standard Fire Insurance Company Attorney Mr. Wystan M. Ackerman for Petitioner The Standard Fire Insurance Company. w/service 02/06/2012. [3878830] [11-8030]--[Edited 02/10/2012 by LMT] (LMT)

03/01/2012	JUDGE ORDER:denying [3870133-2] petition for enbanc rehearing filed by Petitioner The Standard Fire Insurance Company. Petition for panel rehearing is also denied. Adp Dec 2011 [3885706] [11-8030] (LMT)

* * *

U.S. District Court
Western District of Arkansas (Texarkana)
CIVIL DOCKET FOR CASE #:
4:11-cv-04044-PKH

Knowles v. Standard Fire Insurance Company, The
Assigned to: Honorable P. K. Holmes, III

Date Filed: 05/18/2011
Date Terminated: 12/02/2011
Jury Demand: Defendant
Nature of Suit: 110 Insurance
Jurisdiction: Federal Question

Case in other court: Circuit Court of Miller County, Arkansas, CV-11-00239-3

Cause: 28:1332caf

* * *

Date Filed	#	Docket Text
05/18/2011	1	NOTICE OF REMOVAL from Circuit Court of Miller County, Arkansas, case number CV-2011-0239-3. (Filing fee $ 350, receipt number 4000520), filed by Standard Fire Insurance Company, The. (Attachments: # 1 State Court Summons, # 2 State Court Complaint)(cap) (Entered: 05/18/2011)

05/18/2011	2	CLASS ACTION COMPLAINT against Standard Fire Insurance Company, The, filed by Greg Knowles. Filed in Miller County Circuit Court on 4/13/11 and attached to Notice of Removal.(cap) (Entered: 05/18/2011)

* * *

05/18/2011	4	ANSWER to 2 Complaint with Jury Demand by Standard Fire Insurance Company, The.(cap) (Entered: 05/18/2011)

* * *

06/06/2011	6	MOTION to Remand by Greg Knowles. (Goodson, John) (Entered: 06/06/2011)
06/06/2011	7	MEMORANDUM BRIEF in Support of 6 MOTION to Remand by Greg Knowles. (Goodson, John) (Entered: 06/06/2011)

* * *

07/05/2011	9	RESPONSE in Opposition re 6 MOTION to Remand *Memorandum in Opposition to Plaintiff's Motion to Remand* filed by Standard Fire Insurance Company, The. (Attachments: # 1 Exhibit A - Beasley v. Prudential Order, # 2 Exhibit B - Alexander v. Nationwide Order, # 3 Exhibit C - Chivers v. State Farm Order, # 4 Exhibit D - Feely v. Allstate Order, # 5 Exhibit E - Droste v. Farmers Order, # 6 Exhibit F - Johnson v. State Auto Order, # 7 Exhibit G - Beasley v. Reliable Order, # 8 Exhibit H - Freeman v. Farm Bureau Order, # 9 Exhibit I - Affidavit of Brian Harton, # 10 Exhibit J - Complaint in Tuberville Case)(Pruitt, Lyn) (Entered: 07/05/2011)

* * *

12/02/2011	13	MEORANDUM OPPINION AND ORDER granting 6 Motion to Remand. This case shall be remanded forthwith to the Circuit Court of Miller County, Arkansas. Signed by Honorable P. K. Holmes, III on December 2, 2011. (adw) Modified to add text to title on 12/2/2011 (adw). (Entered: 12/02/2011)

12/02/2011	14	Letter from US District Court Clerk to Miller County Circuit Clerk including a Certified Copy of Order filed 12/2/2011 13 . (adw) (Entered: 12/02/2011)

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS TEXARKANA DIVISION

GREG KNOWLES, Individually and as Class Representative on Behalf of all Similarly Situated Persons Within the State of Arkansas — PLAINTIFF

v. — Case No. 11-4044

THE STANDARD FIRE INSURANCE COMPANY — DEFENDANT

AFFIDAVIT OF BRIAN N. HARTON

STATE OF CONNECTICUT)
) ss:
COUNTY OF HARTFORD)

Brian N. Harton, being duly sworn, deposes and says:

1. I am a Director of Product Management and a Business Analysis Lead for the Property Claim Department of Defendant The Standard Fire Insurance Company ("Standard Fire") and its property casualty affiliates. I make this declaration based on my personal knowledge and based on business records of Standard Fire that were created and maintained in the ordinary course of business.

2. In the course of my duties, I am responsible for analysis of claim data with respect to property insurance claims. I am familiar with the manner in which Standard Fire maintains data regarding pay-

ments on property insurance claims. I regularly conduct or supervise persons who conduct searches on that data.

3. A search of Standard Fire's claim payment data was performed with respect to insureds of Standard Fire who made claims under homeowners' insurance policies, insuring premises located in the State of Arkansas. The set of data was limited to insureds who received at least one payment for physical loss or damage to their dwelling (Coverage A under Standard Fire's homeowners' insurance policies) during the period between January 1, 2009 and December 31, 2010. A search was performed to confirm that this set of data did not include insureds who are directors, officers or employees of Standard Fire, judges or justices of Arkansas state courts (based on a list of names provided by counsel), or plaintiffs' counsel. The amounts paid on claims, as reflected in Standard Fire's data, were also compared with the maximum amount potentially available under Coverage A, and claims on which the amount paid for Coverage A as shown in the data set equaled or exceeded the maximum amount potentially available were excluded from the data set.

4. A search of Standard Fire's underwriting data was conducted to determine the amount of the applicable deductible, as reflected in underwriting data, in effect as of the date of loss for all claims falling within the data set described in Paragraph 3 above.

5. Based on a search of the data sets described in Paragraphs 3 and 4 above, the total amount paid by Standard Fire for structural losses (Coverages A and B) on claims included in the data sets, as reflected in the data, was $13,908,956. The aggregate total of the deductibles on such claims, as reflected in the

data described in Paragraph 4 above, was $1,365,850. The total of the structural loss payments plus the deductibles, as reflected in the data, was $15,274,806.

6. An additional data set was prepared using the same parameters described in Paragraphs 3 and 4 above, except that the set of data included all insureds who, according to Standard Fire's data, received at least one payment for physical loss or damage to their dwelling (Coverage A under Standard Fire's homeowners' insurance policies) during the period between January 1, 2001 and April 13, 2011. The total of the structural loss payments (Coverages A and B) plus the deductibles (for newly-tiled claims only) during this time period, as reflected in Standard Fire's data, was $521,950.

7. An additional data set was prepared using the same parameters described in Paragraphs 3 and 4 above, except that the set of data included all insureds who, according to Standard Fire's data, received at least one payment for physical loss or damage to their dwelling (Coverage A under Standard Fire's homeowners' insurance policies) during the period from April 12, 2006 to and including April 13, 2011. The total of the structural loss payments (Coverages A and B) plus the deductibles during this time period, as reflected in Standard Fire's data, was $35,548,766.

/s/ Brian Harton
Brian N. Harton

Sworn to and Subscribed before me
this 21 day of June, 2011

/s/ Corinne A. Lapointe
Notary Public

PETITIONER'S BRIEF

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
OCT 2 2012
OFFICE OF THE CLERK

No. 11-1450

IN THE

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THE STANDARD FIRE INSURANCE COMPANY,

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GREG KNOWLES, individually and on behalf of all others similarly situated within the State of Arkansas,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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QUESTION PRESENTED

Whether, after *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011), when a named plaintiff attempts to defeat a defendant's right of removal under the Class Action Fairness Act of 2005 by filing with a class action complaint a "stipulation" that attempts to limit the damages he "seeks" for the absent putative class members to less than the $5 million threshold for federal jurisdiction, and the defendant establishes that the actual amount in controversy, absent the "stipulation," exceeds $5 million, the "stipulation" is binding on absent class members so as to destroy federal jurisdiction.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all parties to the proceedings below.

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the district court ordering remand is unpublished but is electronically reported at 2011 WL 6013024. Pet. App. 2a. The order of the U.S. Court of Appeals for the Eighth Circuit denying permission to appeal is unpublished but is electronically reported at 2012 WL 3828891. Pet. App. 1a. The order of the Eighth Circuit denying panel rehearing and rehearing en banc is unpublished but is electronically available at 2012 WL 3828845. Pet. App. 16a.

JURISDICTION

The court of appeals denied permission to appeal on January 4, 2012. Pet. App. 1a. The court of appeals denied panel rehearing and rehearing en banc on March 1, 2012. *Id.* at 16a. The petition for a writ of certiorari was filed on May 30, 2012, and granted on August 31, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Class Action Fairness Act of 2005 ("CAFA") is reproduced in full in the addendum to this brief. As most relevant here, CAFA provides:

> (1)(D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.
>
> (2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of

> $5,000,000, exclusive of interest and costs, and is a class action in which—
>
> (A) any member of a class of plaintiffs is a citizen of a State different from any defendant;
>
> . . .
>
> (6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

28 U.S.C. § 1332(d)

STATEMENT

In 2005, Congress enacted CAFA to curb class action abuses, to expand federal jurisdiction over interstate class actions, to protect the rights of defendants and absent class members, and to stop plaintiffs' attorneys from manipulating their complaints to evade federal diversity jurisdiction. In this case, which was filed in a state-court jurisdiction notorious for class action abuses, Plaintiff has pursued a litigation strategy that is flatly at odds with each of those statutory objectives.

CAFA provides for federal jurisdiction over interstate class actions where the amount in controversy—which "shall" be determined by "aggregat[ing]" the "claims of the individual class members," 28 U.S.C. § 1332(d)(6)—exceeds $5,000,000. The district court performed that exact calculation and determined that the aggregated claims of the individual class members exceeded the $5,000,000 threshold. Despite this finding, which Plaintiff did not dispute below or in his brief in opposition, the district court remanded the case based on a "stipula-

tion" in which Plaintiff attempted to bind the putative class to an aggregate classwide recovery that will *not* exceed $5,000,000. That stipulation, however, is a nullity for jurisdictional purposes because it has no bearing on the "claims of the individual class members" that must be aggregated under CAFA. Moreover, as this Court recently held in *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2379 (2011), it is well settled that, before certification of a class, a plaintiff has no authority to diminish the rights of absent individuals he does not yet, and may never, represent.

For each of these reasons, the Court should reverse the district court's remand order and prevent this attempted end run around CAFA.

1. ***Plaintiff's Allegations***

The Standard Fire Insurance Company ("Standard Fire") is a Connecticut-based insurance company that provides property insurance to customers nationwide, including homeowners in Arkansas. When an insured homeowner presents a claim for physical loss or damage to his residence, Standard Fire has an adjuster review the damage and determine the appropriate payment under the insured's policy.

As part of that determination, the adjuster makes an assessment as to whether the work needed to repair the particular damage is sufficiently complex to require supervision and coordination by a general contractor, in addition to hiring trade contractors to perform the repairs. "General contractors customarily add a percentage to the total estimate for a job to cover their fee," referred to as "general contractors' overhead and profit ('GCOP')." Pet. App. 56a–57a. Plaintiff alleges that a typical GCOP percentage "within the construction and insurance industries is 20% of the estimated job," so that, for ex-

ample, "where the repair costs on a job equal $10,000, the GCOP payment will be an additional $2,000." *Id.* at 57a.

Plaintiff alleges that he is a Standard Fire homeowners insurance policyholder who filed a claim after his dwelling, located in Miller County, Arkansas, sustained physical loss or damage as a result of a hailstorm on March 10, 2010. Pet. App. 63a. Plaintiff admits that Standard Fire paid him "to complete [the] repairs to his dwelling," but contends that Standard Fire "failed to pay Plaintiff an additional 20% . . . for GCOP." *Id.* at 64a. Plaintiff alleges that he "should have received payment for GCOP with his payment from [Standard Fire]" because, "[a]t the time [Standard Fire's] adjuster(s)/agent(s) inspected the Plaintiff's dwelling, it was reasonably likely Plaintiff would incur the costs associated with retaining the services of a general contractor." *Id.*

Plaintiff filed this putative class action against Standard Fire in Miller County Circuit Court, a court known to be a "magnet jurisdiction" for class action plaintiffs' lawyers because of its willingness to force defendants to engage in prohibitively expensive and wide-ranging discovery that coerces substantial settlements prior to class certification, and its willingness to certify classes that have been rejected in other jurisdictions. *See* Nan S. Ellis, *The Class Action Fairness Act of 2005: The Story Behind the Statute*, 35 J. Legis. 76, 93 n.115 (2009) ("The most famous magnet jurisdictions are Madison County, Illinois and Miller County, Arkansas."); *see also infra* Part I.A. Plaintiff's complaint purports to assert claims on behalf of "[a]ny and all customers" of Standard Fire "who are residents of Arkansas, who received payments under a homeowners insurance policy . . . for physical loss or damage to their dwell-

ing, such dwelling located in Arkansas, at any time between January 1, 2009 and December 31, 2010" (with certain exceptions). Pet. App. 65a. According to the complaint, the "[c]lass comprises hundreds, and possibly thousands, of individuals geographically dispersed across Arkansas." *Id.* at 66a. The complaint pleads a single cause of action for breach of contract, alleging that Standard Fire "materially breached the terms of [its] standardized policy contracts with Plaintiff and the Class by failing to include payments for GCOP." *Id.* at 72a. The complaint prays for "money damages to Plaintiff and Class Members from the Defendants for their breach of contract in an amount equal to . . . 20% of the amount paid by Defendant to complete repairs to the damaged propert[ies]." *Id.* In Plaintiff's own words, "[t]his case presents the Court with an opportunity to ensure that not only Plaintiff, but all similarly situated insurance customers within the State of Arkansas, are *fully compensated* for their property losses." *Id.* at 57a (emphasis added).

Despite Plaintiff's stated goal of "fully compensat[ing]" the putative class, Pet. App. 57a, his complaint is accompanied by what he calls a "Sworn and Binding Stipulation," in which Plaintiff purports to cap the classwide recovery so that it does not exceed CAFA's $5,000,000 jurisdictional threshold. *Id.* at 74a. The stipulation states:

> I do not now, and will not at any time during this case, whether it be removed, remanded, or otherwise . . . seek damages for the class as alleged in the complaint to which this stipulation is attached in excess of $5,000,000 in the aggregate (inclusive of costs and attorneys' fees).

> I understand that this stipulation is binding, and it is my intent to be bound by it.

Id. at 75a. Plaintiff's complaint alleges that "the Plaintiff and Class stipulate" to limit their recovery to less than $5,000,000, that this "stipulation" is "binding on Plaintiff for purposes of establishing the amount in controversy," and, "[a]s such, there is neither diversity nor [CAFA] jurisdiction for this claim in federal court." *Id.* at 60a.[1]

2. *The District Court's Remand Order*

Based on the allegations in the complaint and the class definition proposed by Plaintiff, Standard Fire removed the case to the Western District of Arkansas because, as required by CAFA, diversity of citizenship exists between the parties and the total amount in controversy, based on the aggregated claims of the individual members of the putative class, is greater than $5,000,000. 28 U.S.C. § 1332(d)(2); Pet. App. 36a–54a.

Plaintiff filed a motion to remand. Pet. App. 4a. The district court granted that motion, applying a

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[1] In addition to attaching this stipulation, Plaintiff's complaint also sought to evade CAFA's $5,000,000 jurisdictional threshold by using another tactic that, as Standard Fire argued below, was akin to fraudulent joinder: arbitrarily framing the class period as shorter than the statute of limitations, thereby opening the door for his counsel to bring separate state court class actions later for other time periods. Thus, here, Plaintiff defined the proposed class to include only Standard Fire policyholders who received payments within a two-year period (2009–10), Pet. App. 65a, even though the statute of limitations for a breach of contract claim under Arkansas law is five years. *See* Ark. Code Ann. § 16-56-111. This tactic is a powerful weapon that potentially enables plaintiffs' lawyers to coerce settlements far in excess of $5,000,000 based on the threat of a multiplicity of future class actions alleging similar theories of recovery.

two-step, burden-shifting analysis adopted by the Eighth Circuit and drawn from a line of authority interpreting the traditional diversity statute, Section 1332(a). *See id.* at 5a–6a (citing, *inter alia*, *Bell v. Hershey Co.*, 557 F.3d 953, 956 (8th Cir. 2009)). The district court began by inquiring whether Standard Fire had "show[n] by a preponderance of the evidence that the amount in controversy exceeds" $5,000,000. *Id.* at 6a. Based on the allegations in the complaint and the uncontradicted evidence that accompanied Standard Fire's opposition to the remand motion, the district court agreed that "the actual amount in controversy reaches, if not exceeds, the federal court's minimum threshold for jurisdiction pursuant to CAFA," emphasizing that "Plaintiff ha[d] failed to counter Defendant's estimates with evidence or argument." *Id.* at 8a.

Applying the second part of this test, the court noted that the "burden" then "shift[ed] to Plaintiff to prove to a legal certainty that his claim falls under the $5 million threshold for remand to state court." Pet. App. 9a. According to the district court, Plaintiff had met this burden, and was therefore entitled to a remand, because his stipulation is "legally binding" and "show[s] to a legal certainty that the aggregate damages claimed on behalf of the putative class shall in good faith not exceed the state court's jurisdictional limitation of $5,000,000." *Id.* at 9a, 15a.

Standard Fire petitioned the Eighth Circuit for permission to appeal pursuant to CAFA, 28 U.S.C. § 1453 (c)(1), but the court of appeals summarily denied the petition. Pet. App. 1a. While Standard Fire's petition for rehearing was pending, the Eighth Circuit decided *Rolwing v. Nestle Holdings, Inc.*, 666 F.3d 1069 (8th Cir. 2012), which affirmed an order of remand under CAFA based on a similar stipulation

purporting to limit class damages to less than $5,000,000. The court of appeals held that the stipulation in *Rolwing* was sufficient to defeat federal jurisdiction, *id.* at 1072, even though the aggregated total of the individual class members' claims exceeded $12,000,000—more than twice CAFA's jurisdictional threshold. *Id.* at 1070–71. After issuing *Rolwing*, the court of appeals denied Standard Fire's petition for rehearing. Pet. App. 16a.

SUMMARY OF ARGUMENT

Congress enacted CAFA to curtail state court class action abuses by authorizing defendants to remove sizable, interstate class actions to federal court. The district court's remand order contradicts CAFA's plain language, purpose, and history, as well as this Court's holding in *Smith v. Bayer* and other cases—all of which dictate that Plaintiff's stipulation purporting to waive damages on behalf of a not-yet-certified class can have no effect on CAFA's amount-in-controversy determination.

I. This case falls squarely within the federal courts' diversity jurisdiction under CAFA because the aggregated claims of the individual members of the putative class exceeded $5,000,000 at the time of removal.

A. CAFA fundamentally altered and expanded federal diversity jurisdiction over interstate class actions. In particular, Congress changed the amount-in-controversy requirement as it relates to these class actions in order to prevent plaintiffs from manipulating their complaints to keep such cases in class-action-friendly state courts—like the Circuit Court of Miller County—rather than federal court. Traditional diversity jurisdiction under 28 U.S.C. § 1332(a) looks only to the "matter in controversy,"

without specifying a methodology for determining that amount, and this Court has construed Section 1332(a) to forbid aggregation of individual class members' claims for jurisdictional purposes. CAFA, however, explicitly requires that "the claims of the individual class members shall be aggregated" to determine whether they exceed the statute's $5,000,000 jurisdictional threshold. 28 U.S.C. § 1332(d)(6).

B. The district court's remand order conflicts with CAFA's plain language. Based on the face of the complaint and Standard Fire's uncontradicted evidence and argument, the district court performed the calculation mandated by CAFA and found that the aggregate total of the individual class members' claims exceeded $5,000,000. That should have been the end of the jurisdictional inquiry. Instead, however, the district court concluded that a remand was appropriate because Plaintiff purports in his stipulation to limit the classwide recovery to no more than $5,000,000. But the term "claim," as used in CAFA, refers to each individual class member's *right to recovery* under the operative facts and causes of action alleged in the complaint, not the amount actually *sought in recovery* in vindication of that right. CAFA's text does not authorize Plaintiff to use a stipulation to alter the aggregated total of the *individual* class members' *claims* and thereby overcome the statutorily prescribed amount-in-controversy calculation.

C. The district court's remand order also conflicts with the purpose and history of CAFA, which was intended to prevent precisely the kind of manipulation of the amount in controversy and thwarting of federal jurisdiction that Plaintiff attempts in this case. *See* Pub. L. No. 109-2, § 2, 119 Stat. 4, 4–5 (2005). In seeking to curb state court class action

abuses and protect the rights of out-of-state class action defendants and the "legitimate claims" of absent class members, Congress intended to provide a federal forum for just this type of interstate class action. But the district court's remand order would force Standard Fire—and, in the event a class is certified, the class members—to litigate in a state court known for allowing "lawyers to 'game' the procedural rules" and failing to apply the rigorous protections that federal courts apply under Federal Rule 23. S. Rep. No. 109-14, at 4 (2005).

II. Basic class action doctrine and fundamental due process principles further confirm that Plaintiff's stipulation cannot be used to evade CAFA's jurisdictional threshold. This Court recently reaffirmed in *Smith v. Bayer* that an "uncertified class action cannot bind proposed class members," 131 S. Ct. at 2381 n.11, squarely rejecting the "novel and surely erroneous argument that a nonnamed class member is a party to the class action litigation *before the class is certified*." *Id.* at 2379. Thus, before a class is certified, nothing Plaintiff says or does can diminish the rights of absent individuals. Plaintiff's lack of authority to stipulate to any reduction in the "claims of the [other] individual class members" renders the stipulation irrelevant to the CAFA jurisdictional inquiry.

III. Even if this Court were to apply the traditional burden-shifting framework borrowed by the Eighth Circuit from decisions interpreting Section 1332(a), Plaintiff's stipulation still would not establish "*to a legal certainty*" that the amount in controversy in this case is $5,000,000 or less. *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938) (emphasis added). Before Plaintiff can take *any* actions to bind the absent class members, the

trial court would have to appoint Plaintiff as class representative and ensure that enforcement of the stipulation is in the best interests of the class. Those contingent events had not occurred as of the time of removal, were not legally certain to occur in the future, and therefore could not defeat federal jurisdiction as a matter of law. *Id.* at 293.

For each of these reasons, the district court's remand order should be reversed so this putative class action can be litigated in federal court where it belongs under CAFA.

ARGUMENT

I. REMAND WAS IMPROPER BECAUSE PLAINTIFF'S STIPULATION CANNOT REDUCE THE AMOUNT IN CONTROVERSY UNDER CAFA.

This Court has frequently reaffirmed "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them" by Congress. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). In CAFA, Congress gave federal courts diversity jurisdiction over interstate class actions in which the amount in controversy exceeds $5,000,000, and directed courts to determine that amount by "aggregat[ing]" the "claims of the individual class members." 28 U.S.C. § 1332(d)(6). The district court found, based on Standard Fire's undisputed calculation, that the aggregated total of the individual class members' claims—as determined by the class definition and allegations in Plaintiff's complaint at the time of removal—exceeded CAFA's $5,000,000 jurisdictional requirement. Pet. App. 8a. That should have been the end of the inquiry, and Plaintiff's motion to remand should have been denied. *See, e.g., St. Paul Mercury*, 303 U.S. at 291

("the status of the case as disclosed by the plaintiff's complaint is controlling in the case of a removal").

Despite the district court's factual finding, it concluded that Plaintiff could nonetheless defeat federal jurisdiction based on the stipulation in which he purports to bind the class to a classwide recovery of no more than $5,000,000 in damages. But the amount in controversy under CAFA is based on the aggregated total of the *individual* class members' claims, not the potential *classwide* recovery sought by the named plaintiff. Plaintiff's stipulation therefore is irrelevant to the CAFA jurisdictional inquiry. To hold otherwise would contradict CAFA's text, purpose, and history, and would revive the exact state court class action abuses and jurisdictional manipulations that CAFA was designed to eliminate. *See Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907) ("Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right . . . .").

A. CAFA Expanded Federal Diversity Jurisdiction To Address Precisely The Class Action Abuses Exemplified By This Case.

Congress established diversity jurisdiction "to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 554–55 (2005). Before CAFA, federal diversity jurisdiction over putative class actions was narrow because it was governed by the traditional diversity statute, 28 U.S.C. § 1332(a), which requires complete diversity among plaintiffs and defendants—*i.e.*, all plaintiffs must be citizens of different States from all defendants. Section 1332(a)

further requires the named plaintiff's "matter in controversy [to] exceed[ ] the sum or value of $75,000." Where that is not the case, the amount in controversy as to each putative class member cannot be aggregated to reach the federal jurisdictional threshold. *See Zahn v. Int'l Paper Co.*, 414 U.S. 291, 300 (1973) (describing "the well-established rule . . . that there may be no aggregation and that the entire case must be dismissed where none of the plaintiffs claims more than [the jurisdictional minimum]"); *Snyder v. Harris*, 394 U.S. 332, 338 (1969).[2]

For many years, plaintiffs' lawyers exploited these requirements, filing major interstate class actions in certain state courts, such as the Circuit Court of Miller County, known to be hospitable to class actions and "bias[ed] against out-of-State defendants." Pub. L. No. 109-2, § 2(a)(2), 119 Stat. at 4. As Congress stated in CAFA's findings, this led to "abuses of the class action device" that harmed absent class members and foreign defendants, and undermined federal diversity jurisdiction. *See id.* § 2(a)(4), 119 Stat. at 5.

Chief among the tactics used by plaintiffs' lawyers to keep class actions in state court was manipulation of the amount-in-controversy requirement, accomplished by pleading demands that fell just below the $75,000 jurisdictional threshold under 28 U.S.C. § 1332(a). *See, e.g., Davis v. Carl Cannon Chevrolet-Olds, Inc.*, 182 F.3d 792, 797–98 (11th Cir. 1999); *see also In re Prudential Ins. Co. Am. Sales Practice*

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[2] After CAFA was enacted, this Court held that once a federal court determines that the matter in controversy on a named plaintiff's claim exceeds $75,000, the court can exercise supplemental jurisdiction over the absent class members' claims under 28 U.S.C. § 1367. *See Exxon Mobil*, 545 U.S. at 549.

Litig., 148 F.3d 283, 305 (3d Cir. 1998); *infra* Section I.C. Indeed, before CAFA took effect, Plaintiff's counsel in this very case had filed dozens of class action complaints in Miller County—including eight cases against insurance companies alleging the same GCOP-related claim asserted here[3]—in which they framed the complaints to prevent removal by limiting the named plaintiffs' requests for recovery to under the $75,000 amount in controversy applicable under Section 1332(a). They then obtained orders from the Miller County court deferring briefing on all dispositive motions until after class certification was decided. The court permitted Plaintiff's counsel to pursue expensive, far-ranging, and burdensome discovery—potentially costing defendants tens of millions of dollars and disrupting their ability to do business—prior to briefing on certification. *See, e.g.*, Michelle Massey, *'Failure to Communicate' Could Lead to $45 M in Discovery Costs*, Southeast Texas Record, Aug. 8, 2007 (explaining that a Miller County court "ordered defendant Foremost Insurance Company to produce all of its claim files" within ninety days, "even though the defendants estimated the cost for production at $45 million").

None of those eight cases resulted in a decision on class certification, let alone a trial. Instead, because of the extraordinarily expensive pre-

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[3] *Droste v. Farmers Ins. Exch.*, No. CV-2004-294-3; *Feely v. Allstate Cnty. Mut. Ins. Co.*, No. CV-2004-294-3A; *Freeman v. Farm Bureau Mut. Ins. Co. of Ark., Inc.*, No. CV-2004-294-3B; *Beasley v. Prudential Gen. Ins. Co.*, No. CV-2005-58-1; *Beasley v. Reliable Life Ins. Co.*, No. CV-2005-58-1; *Alexander v. Nationwide Mut. Ins. Co.*, No. CV-2009-120-3; *Johnson v. State Auto Mut. Ins. Co.*, No. CV-2010-114-3; *Chivers v. State Farm Fire & Cas. Co.*, No. CV-2010-251-3 (all in Ark. Cir. Ct. Miller County).

certification discovery authorized by the state court, all of the defendants agreed to settlements. *Cf. Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (recognizing that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases"); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (noting "the risk of 'in terrorem' settlements that class actions entail"). Although many of the court filings in these cases remain under seal, available information and news reports indicate that these settlements resulted in attorneys' fee awards that totaled more than $150 million. *See, e.g.*, Mem. in Opp. to Motion to Remand, Ex. D at 23 ($63.9 million attorneys' fee award in Allstate settlement of GCOP class action); *see also Big Money for Lawyers*, Arkansas Times, Dec. 14, 2011 (describing another Miller County class action in which a settlement resulted in "the lawyers g[etting] $185 million in legal fees"). It is not known what portion of those settlements, if any, was distributed to class members. *Cf. Judge OKs $90M "Click Fraud" Settlement*, Associated Press Financial Wire, July 29, 2006 ("No one will receive cash except the lawyers, who will split $30 million.").[4]

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[4] In sharp contrast, federal courts have routinely stricken class allegations or have denied class certification in cases raising the same GCOP-related claims. *See, e.g., Nguyen v. St. Paul Travelers Ins. Co.*, No. 06-4130, 2008 WL 4534395, at *8 (E.D. La. Oct. 6, 2008); *Mills v. Foremost Ins. Co.*, 269 F.R.D. 663, 682 (M.D. Fla. 2010); *John v. Nat'l Sec. Fire & Cas. Co.*, No. 06-1407, 2008 WL 394220, at *2 (W.D. La. Feb. 12, 2008); *John v. Nat'l Sec. Fire & Cas. Co.*, No. 06-1407, 2006 WL 3228409, at *4 (W.D. La. Nov. 3, 2006), *reconsideration den'd*, 2007 WL 148735 (W.D. La. Jan. 16, 2007), *aff'd*, 501 F.3d 443 (5th Cir. 2007); *Bailey v. State Farm Fire & Cas. Co.*, No. CIV-00-1239-R, slip op. at 9-14 (W.D. Okla. Jan. 2, 2002); *Harring-*

Nor can the Arkansas Supreme Court be relied upon to protect out-of-state defendants from such abuses arising out of Miller County. Contrary to this Court's holding in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551–52 (2011), the Arkansas Supreme Court has instructed trial courts that class certification "does not require a rigorous analysis," *Farmers Union Mut. Ins. Co. v. Robertson*, 370 S.W.3d 179, 186 (Ark. 2010), and held that trial courts should not "delve into the merits" on class certification. *Gen. Motors Corp. v. Bryant*, 285 S.W.3d 634, 638 (Ark. 2008); *see also DirecTV, Inc. v. Murray*, 2012 Ark. 366, at *11–12 (Oct. 4, 2012) ("Neither this court nor the circuit court delves into the merits of the underlying claims at this stage . . . ."); F. Ehren Hartz, *Certify Now, Worry Later: Arkansas's Flawed Approach to Class Certification*, 61 Ark. L. Rev. 707 (2009). In fact, earlier this month, the Arkansas Supreme Court upheld certification of a Miller County class action (certified by the same judge presiding over this case) that could not have been certified in federal court—holding that "individual issues and defenses . . . raised by the defendant cannot defeat class certification." *DirecTV*, 2012 Ark. 366, at *16; *see also id.* at *13 (class certification is appropriate "irrespective of varying fact patterns which underlie individual claims") (internal quotation marks and emphasis omitted). That holding directly contradicts *Wal-Mart*. *See* 131 S. Ct. at 2561 (rejecting class certification because a defendant is "entitled to litigate its statutory defenses to individual claims").

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ton v. State Farm Lloyds, Inc., No. 4:97-CV-832-Y, slip op. at 16-17 (N.D. Tex. Mar. 31, 1999).

To put an end to the gamesmanship that was keeping major class actions in such state courts, CAFA fundamentally altered the principal rules governing diversity jurisdiction in the class action context, "enlarg[ing] . . . federal-court diversity jurisdiction . . . clearly and conspicuously, by amending § 1332." *Exxon Mobil*, 545 U.S. at 594 n.12 (Ginsburg, J., dissenting) (internal quotation marks omitted); *see also Hollinger v. Home State Mut. Ins. Co.*, 654 F.3d 564, 569 (5th Cir. 2011) (per curiam) (CAFA "greatly expand[ed] federal jurisdiction" over class actions) (footnote omitted). First and foremost, CAFA created a jurisdictional threshold that is determined by the "aggregated" "claims of the individual class members"—specifically, the individual claims of every person "who fall[s] within the definition of the proposed class." 28 U.S.C. § 1332(d)(1)(D), (6); *see also Exxon Mobil*, 545 U.S. at 571 (CAFA "abrogates the rule against aggregating claims"). In addition, CAFA discarded the traditional requirement of complete diversity under Section 1332(a) in favor of only minimal diversity, which exists when "*any* member of a class of plaintiffs is a citizen of a State different from *any* defendant." 28 U.S.C. § 1332(d)(2)(A) (emphases added). It also eliminated the usual one-year limitation that applies to removal on the basis of diversity jurisdiction, eliminated the limitation preventing a defendant from removing a case brought in its home State, and eliminated the requirement that all defendants consent to removal. 28 U.S.C. § 1453(b).

These significant changes were intended to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance." Pub. L. No. 109-2, § 2(b)(2), 119 Stat. at 5; *see also*

Smith, 131 S. Ct. at 2382 ("In [CAFA], Congress enabled defendants to remove to federal court any sizable class action involving minimal diversity of citizenship."); *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1473 (2010) (Ginsburg, J., dissenting) (In passing CAFA, "Congress sought to check what it considered to be the overreadiness of some state courts to certify class actions.").[5] But, as this case demonstrates, plaintiffs' lawyers have deployed tactics meant to evade CAFA's terms and to facilitate exactly the same litigation behavior in state court that preceded CAFA. In fact, after CAFA took effect and nearly all of the cases filed pre-CAFA were settled, in 2010, Plaintiff's counsel in this case (and other lawyers) began filing numerous additional class action suits in the Miller County Circuit Court that included stipulations or allegations purporting to limit the class recovery to less than $5,000,000. *See, e.g.*, *Basham v. Am. Nat'l Cnty. Mut. Ins. Co.*, No. CV-2011-0623-3 (Ark. Cir. Ct. Miller County). To date, those tactics have been successful at thwarting removal under CAFA by convincing federal district courts in Arkansas to remand the class actions to Miller County and other Arkansas state courts.[6]

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[5] *See also* Sarah S. Vance, *A Primer on the Class Action Fairness Act of 2005*, 80 Tul. L. Rev. 1617, 1621 (2006); Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. Pa. L. Rev. 1823, 1864–65 (2008); *Knudsen v. Liberty Mut. Ins. Co.*, 435 F.3d 755, 758 (7th Cir. 2006) ("The conduct of plaintiffs and the state judge in this litigation . . . illustrates why Congress enacted the Class Action Fairness Act.").

[6] *See, e.g.*, *Deaton v. Frito-Lay N. Am., Inc.*, No. 1:12-cv-01029, 2012 WL 3986804 (W.D. Ark. Sept. 11, 2012); *Goodner v. Clayton Homes, Inc.*, No. 4:12-cv-04001, 2012 WL 3961306 (W.D. Ark. Sept. 10, 2012); *Basham v. Am. Nat'l Cnty. Mut. Ins.*

B. Permitting Plaintiff To Rely On A Stipulation To Defeat Removal Conflicts With The Plain Language Of CAFA.

Under CAFA's plain language, removal was proper in this case because, as the district court expressly found, the aggregated total of the individual class members' claims exceeds CAFA's $5,000,000 jurisdictional threshold. The district court disregarded CAFA's text by permitting Plaintiff to resort to pre-CAFA tactics to try to reduce the amount in controversy.

1. *CAFA's plain language requires aggregating the claims of the individual class members.* "As with any question of statutory interpretation," the "analysis" of CAFA's amount-in-controversy requirement "begins with the plain language of the statute." *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009). CAFA provides that federal district courts have jurisdiction over class actions where there is minimal diversity of citizenship and "the matter in controver-

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Co., No. 4:12-cv-04005, 2012 WL 3886189 (W.D. Ark. Sept. 6, 2012); *Oliver v. Mona Vie, Inc.*, No. 4:11-cv-04125, 2012 WL 1965613 (W.D. Ark. May 31, 2012); *Smith v. Am. Bankers Ins. Co. of Fla.*, No. 2:11-cv-02113, 2011 WL 6090275 (W.D. Ark. Dec. 7, 2011); *McClendon v. Chubb Corp.*, No. 2:11-cv-02034, 2011 WL 3555649 (W.D. Ark. Aug. 11, 2011); *Thompson v. Apple, Inc.*, No. 3:11-cv-03009, 2011 WL 2671312 (W.D. Ark. July 8, 2011); *Tomlinson v. Skechers U.S.A., Inc.*, No. 11-5042, 2011 U.S. Dist. LEXIS 142862 (W.D. Ark. May 25, 2011); *Murphy v. Reebok Int'l, Ltd.*, No. 4:11-cv-214-DPM, 2011 WL 1559234 (E.D. Ark. Apr. 22, 2011); *Tuberville v. New Balance Athletic Shoe, Inc.*, No. 1:11-cv-01016, 2011 WL 1527716 (W.D. Ark. Apr. 21, 2011); *Harris v. Sagamore Ins. Co.*, No. 2:08-cv-00109, 2008 WL 4816471 (E.D. Ark. Nov. 3, 2008).

sy exceeds the sum or value of $5,000,000." 28 U.S.C. § 1332(d)(2). The statute further sets forth a specific mechanism for calculating the "sum or value" of the "matter in controversy": "the *claims* of the *individual class members* shall be *aggregated* to determine whether" the total exceeds the jurisdictional threshold. *Id.* § 1332(d)(6) (emphases added).

Here, in opposing the remand motion, Standard Fire presented the district court with a calculation of the aggregated total of the "claims of the individual class members" that was based on the class definition and the breach-of-contract allegations Plaintiff asserted in his complaint. Pet. App. 7a–8a. Specifically, "Plaintiff seeks money damages for himself and the Class for breach of contract arising from Defendant's failure to provide proper payments for GCOP," which allegedly amounts to "20% of the amount paid by Defendant to complete repairs to a damaged dwelling." *Id.* at 69a. Thus, for each customer falling within Plaintiff's proposed class definition, Standard Fire "calculat[ed] the GCOP at 20% of the total" amount of the insurance payment, and added both "a 12% statutory penalty for breach of contract" and attorneys' fees also provided by the same statute. *Id.* at 7a–8a. Standard Fire then aggregated each of these putative class member's claims and arrived at a total amount in controversy in excess of $5,000,000. *Id.* at 8a.

Based on Standard Fire's showing, the district court found that "the actual amount in controversy reaches, if not exceeds, the federal court's minimum threshold for jurisdiction pursuant to CAFA." Pet. App. 8a. In fact, as the district court noted, Plaintiff "failed to counter" Standard Fire's estimates with *any* "evidence or argument" of his own. *Id.* Nor did Plaintiff challenge the district court's factual finding

in the court of appeals or in his opposition to Standard Fire's petition for certiorari.

The district court's finding that the "aggregated" total of the "claims of the individual class members" exceeded CAFA's $5,000,000 threshold at the time of removal is controlling and irrebuttable; the statute expressly directs courts to determine the amount in controversy by aggregating the claims of the individual class members. Once that determination has been made, it does not authorize a putative class representative to evade the calculation through a stipulation, allegation, or any other means.

Despite CAFA's plain language, the district court reasoned that the purported cap on *classwide recovery* set forth in Plaintiff's stipulation, not the aggregated *claims* of the *individual* class members, governed the amount-in-controversy determination. Pet. App. 11a; *cf. Rolwing*, 666 F.3d 1069, 1070–72 (permitting plaintiff to stipulate to reduce $12 million worth of claims by absent class members to $5 million). But if Congress had wanted federal jurisdiction under CAFA to turn on the sum demanded by the named plaintiff for a classwide recovery—rather than the "aggregated" "claims of the *individual* class members"—it would have said so. Congress "knows how to" premise federal jurisdiction on the sum demanded in a complaint "when it wants to." *Atl. Sounding Co. v. Townsend*, 557 U.S. 404, 416 (2009) (internal quotation marks omitted); *see, e.g.*, 28 U.S.C. § 1446 (c)(2) ("the *sum demanded* in good faith in the initial pleading shall be deemed to be the amount in controversy" under Section 1332(a)) (emphasis added). It did not do so in CAFA. Accordingly, the district court's undisputed finding that the aggregated total of the individual class members' claims exceeded $5,000,000 conclusively establishes

that CAFA's amount-in-controversy requirement was satisfied at the time this case was removed to federal court.

2. *The amount in controversy calculation under CAFA is different from the calculation under Section 1332(a).* The rules that govern CAFA diversity differ significantly from those that govern in the traditional diversity setting under 28 U.S.C. § 1332(a). In that context, "[i]f [the plaintiff] does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove." *St. Paul Mercury*, 303 U.S. at 294. This rule flows directly from the language of Section 1332(a) itself, which provides that diversity jurisdiction exists "where the matter in controversy exceeds the sum or value of $75,000." *See also* 28 U.S.C. § 1446(c)(2) (where a removing party invokes federal jurisdiction under Section 1332(a), "the sum demanded in good faith in the initial pleading" generally controls).

CAFA expressly establishes a different regime. Although, like Section 1332(a), CAFA provides that the existence of diversity jurisdiction turns on whether "the matter in controversy exceeds" a specific amount—"the sum or value of $5,000,000"—CAFA, unlike Section 1332(a), explicitly directs how that amount "shall" be calculated: CAFA specifies that courts are to calculate the "matter in controversy" by "aggregat[ing]" the "claims of the individual class members." 28 U.S.C. § 1332(d)(2), (6). Thus, although an individual plaintiff's stipulation imposing a cap on the damages he is seeking to recover on his own behalf may limit the value of the "matter in controversy" under Section 1332(a) (the "sum demanded," in the words of Section 1446(c)(2))—and thus de-

feat removal of an individual action—a similar stipulation is irrelevant to the CAFA inquiry because CAFA focuses on the claims of the individual class members, not the amount being sought by the named plaintiff on behalf of the putative class.[7]

3. *The term "claim," as used in CAFA, refers to the individual class members' right to recovery under the operative facts and causes of action alleged in the complaint.* Plaintiff's inability to use a stipulation to reduce the amount in controversy under CAFA is confirmed by the statute's use of the term "claim" in requiring the court to "aggregate[ ]" the "claims of the individual class members." In this context, "claim" refers to each individual class member's *right to recovery* under the operative facts and causes of action alleged in the complaint, not the amount ac-

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[7] The district court below, like other courts that have held that such stipulations defeat federal jurisdiction, invoked the "master of the complaint" doctrine to hold that the plaintiff can avoid federal court if he so chooses. *See* Pet. App. 27a ("'[T]he plaintiff is the master of the case and may limit his claims . . . to keep the amount in controversy below the threshold . . . .'") (quoting *Morgan v. Gay*, 471 F.3d 469, 474 (3d Cir. 2006)). But that doctrine—which applies in the traditional diversity setting governed by 28 U.S.C. § 1332(a), where the individual plaintiff's own demand controls the amount in controversy, *see St. Paul Mercury*, 303 U.S. at 294—does not authorize this type of stipulation in the class action setting. Even if a putative class representative, like an individual plaintiff, is the "master of the complaint" and is free to frame the substantive allegations giving rise to the causes of action he asserts therein, *see Caterpillar Inc. v. Williams*, 482 U.S. 386, 398–99 (1987), the mere filing of the complaint does not make him the master of the claims that flow from those allegations belonging to *other* individual class members. Plaintiff cannot be the master of those claims because he does not yet represent those individuals. *See* Part II, *infra*.

tually *sought in recovery* in vindication of that right. *See Black's Law Dictionary* 281 (9th ed. 2009) (defining "claim" as the "aggregate of operative facts giving rise to a right enforceable by a court"). This is consistent with Federal Rule 23 itself, which speaks to the "claims or defenses of the class" and "the desirability . . . of concentrating the litigation of the claims in the particular forum." Fed. R. Civ. P. 23 (a)(3), (b)(3)(C). Rule 23 is plainly referring to the putative class members' legal entitlement to relief arising from a common set of operative facts, not merely to the class members' monetary demand.

Interpreting "claim[ ]" in Section 1332(d)(6) to mean only the sum demanded would be illogical because, in a yet-to-be-certified class action, *none* of the "individual class members" (other than the named plaintiff who seeks to become the class representative) has asserted *any* demand for payment against the defendant. Two Terms ago, this Court arrived at the same meaning of the term "claim" in interpreting 28 U.S.C. § 1500, explaining that "the term 'claim' is used . . . synonymously with 'cause of action,'" and that both terms "refer[ ] simply to facts without regard to judicial remedies." *United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723, 1728–29 (2011) (internal quotation marks omitted). Just like here, that interpretation of "claim" was the only "reasonable interpretation" in *Tohono* because the statute applied even where a party had not yet demanded any relief:

> The statute refers to a person who acts under color of federal law in respect to a cause of action at the time it arose. *But at that time, the person could not act in respect to the relief requested, for no complaint was yet filed.* This use of the phrase "in respect to a cause of ac-

> tion" *must refer to operative facts and not whatever remedies an aggrieved party might later request.*

Id. at 1728 (emphases added). Thus, this Court held that "[t]wo suits are for or in respect to the same claim . . . if they are based on substantially the same operative facts, regardless of the relief sought in each suit." *Id.* at 1731.

In reaching that decision, the Court also relied on the meaning of the word "claim" in the context of claim preclusion: "The now-accepted test in preclusion law for determining whether two suits involve the same claim or cause of action depends on factual overlap . . . ." *Tohono*, 131 S. Ct. at 1730; *see also* Restatement (Second) of Judgments § 24 ("[T]he claim extinguished [by claim preclusion] includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose."). The claim preclusion context is particularly relevant when interpreting CAFA because class action doctrine is a species of claim preclusion. *See Smith*, 131 S. Ct. at 2379 (one of "the recognized exception[s] to the rule against nonparty preclusion [is] for members of [certified] class actions"); *see also Taylor v. Sturgell*, 553 U.S. 880, 900–01 (2008). CAFA ensures fairness in class actions in part by shielding absent class members from abuses of the claim preclusion doctrine and explicitly protecting their "legitimate claims," Pub. L. No. 109-2, § 2(b), 119 Stat. at 5—which is a clear reference to the class members' legal rights under state law, rather than the amount requested to remedy the violation of those rights.

C. The Purpose And History Of CAFA Confirm That Remand Was Improper.

The purpose and history of CAFA confirm what the text itself makes clear: Plaintiff's stipulation cannot oust federal jurisdiction. Allowing putative class representatives to evade federal jurisdiction under CAFA in the manner attempted here would create a gaping loophole that would defeat the congressional objectives underlying CAFA—to the profound detriment of both absent class members and class action defendants. *See United States v. Naftalin*, 441 U.S. 768, 776–77 (1979) (reviewing legislative history and avoiding a construction that would "create a loophole in the statute that Congress simply did not intend to create").

1. *Congress's findings in the Act made clear that CAFA was enacted to stop state-court abuses and provide a federal forum for interstate class actions.* In enacting CAFA, Congress left no doubt about its intentions, describing in the Act itself the findings and purposes animating the law. For example, Congress described the "abuses of the class action device that have . . . harmed class members with legitimate claims and defendants that have acted responsibly." Pub. L. No. 109-2, § 2(a)(2), 119 Stat. at 4. Congress also found that "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed, such as where . . . counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value." *Id.* § 2(a)(3). And, perhaps most relevant to this case, Congress found that "[a]buses in class actions undermine . . . the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are . . . keeping cases of

national importance out of Federal court [and] . . . sometimes acting in ways that demonstrate bias against out-of-State defendants." *Id.* § 2(a)(4), 119 Stat. at 5.

Based on those findings, Congress announced its purposes in enacting CAFA: to "assure fair and prompt recoveries for class members with legitimate claims" and "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." Pub. L. No. 109-2, § 2(b)(1), (2), 119 Stat. at 5. These purposes would be defeated by endorsing Plaintiff's stipulation tactic.

2. *CAFA's legislative history further elucidates Congress's intent.* CAFA's legislative history further confirms Congress's intention to protect both out-of-state defendants and absent class members from class action abuses in state courts like the Circuit Court of Miller County. Specifically, CAFA was intended to close the loopholes created by the pre-CAFA diversity regime, which "enable[d] lawyers to 'game' the procedural rules and keep nationwide or multi-state class actions in state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class member interests." S. Rep. No. 109-14, at 4.

In particular, CAFA's legislative history brims with congressional condemnation of attorneys "seek[ing] $74,999 in damages on behalf of each plaintiff or explicitly exclud[ing] from the proposed class anybody who has suffered $75,000 or more in damages." S. Rep. No. 109-14, at 26–27; *see also id.* at 11 ("class action complaints often include a provision stating that no class member will seek more

than $75,000 in relief, even though they can simply amend their complaints after the removal to seek more relief and even though the class action seeks millions of dollars in the aggregate"); 151 Cong. Rec. S1104 (Feb. 8, 2005) (statement of Sen. Grassley) (denouncing "gamesmanship tactics" with respect to the amount in controversy in class actions); 151 Cong. Rec. S1079 (Feb. 8, 2005) (statement of Sen. Dodd) (same). By changing the prerequisites for diversity jurisdiction in the class action context, CAFA gave effect to Congress's "overall intent . . . to strongly favor the exercise of federal diversity jurisdiction" over interstate class actions. S. Rep. No. 109-14, at 35. Moreover, leaders on both sides of the aisle agreed when CAFA was enacted that the bill would "not in any way limit damages" to absent class members. 151 Cong. Rec. S1080 (Feb. 8, 2005) (statement of Sen. Dodd); *id.* (statement of Sen. Lott) (same).

The legislative history of CAFA expressly identifies rampant class action abuse in "magnet" jurisdictions as one of the problems that Congress attempted to remedy through CAFA. *See, e.g.*, S. Rep. No. 109-14, at 13–14, 22–23; 151 Cong. Rec. H726 (Feb. 17, 2005) (statement of Rep. Sensenbrenner) (noting that "[a] major element of the worsening crisis is the exponential increase in State class action cases in a handful of 'magnet' or 'magic' jurisdictions"); 151 Cong. Rec. S997 (Feb. 7, 2005) (statement of Sen. Frist) ("Aggressive trial lawyers have found there are a few counties . . . [where] State court judges are quick to certify a class action").

When Congress enacted CAFA, it was particularly focused on the victimization of out-of-state defendants, S. Rep. No. 109-14, at 13, emphasizing that "the Framers established diversity jurisdiction to ensure fairness for all parties . . . , particularly . . . de-

fendants from one state [that] are sued in the local courts of another state." *Id.* at 6. In Congress's view, however, pre-CAFA diversity and removal standards "facilitated a parade of abuses" and "thwart[ed] the underlying purpose of the constitutional requirement of diversity jurisdiction." *Id.*

Congress also sought to protect the due process rights of absent class members. Congress understood that "[w]hen judges indiscriminately certify class actions, unnamed plaintiffs lose important legal rights and can be denied appropriate awards for their injuries." S. Rep. No. 109-14, at 66; *see also id.* at 14 ("[C]onstitutional due process rights are often ignored in class actions."). In fact, at the time CAFA was passed, there was "clear and undeniable" evidence that collusion between state courts and the plaintiff's bar was "victimizing plaintiffs . . . who unwittingly have their legal rights adjudicated." 151 Cong. Rec. S1094 (Feb. 8, 2005) (statement of Sen. Hatch); *see also* S. Rep. No. 109-14, at 26. Of equal concern were examples of class actions certified in state court even though a federal court had already found that the identical class action "would clearly violate the due process rights of . . . the purported class members." S. Rep. No. 109-14, at 22.

The district court's remand order deprives Standard Fire of the federal forum that Congress intended to provide to defendants facing significant potential liability in interstate class actions, and jeopardizes the due process rights of absent class members by allowing Plaintiff to unilaterally impose an arbitrary limit on classwide recovery in order to evade federal jurisdiction. Such a "perverse" interpretation of CAFA cannot stand. *Wal-Mart*, 131 S. Ct. at 2559.

II. PERMITTING PLAINTIFF TO RELY ON A STIPULATION TO DEFEAT REMOVAL VIOLATES BASIC CLASS ACTION PRINCIPLES AND THE DUE PROCESS RIGHTS OF ABSENT CLASS MEMBERS.

Basic class action doctrine and fundamental due process principles also prevent a putative class representative from using a stipulation to defeat removal under CAFA. As this Court recently reaffirmed in *Smith v. Bayer*, an "uncertified class action cannot bind proposed class members" because those absent class members have not had their own day in court and are not adequately represented by a party to the litigation. 131 S. Ct. at 2381 n.11. As a matter of federal class action law, a named plaintiff's ability to bind nonparties "can come about in federal courts in just one way—through the procedure set out in Rule 23." *Id.* at 2381 (citing *Taylor*, 553 U.S. at 901).

Fundamental due process principles mandate the same result: In a class action for monetary relief, absent class members may not be bound by a named plaintiff's actions until, at a minimum, they have "receive[d] notice plus an opportunity to be heard and participate in the litigation," they have "be[en] provided with an opportunity to remove [themselves] from the class," and the named plaintiff has been determined to "adequately represent the interests of the absent class members." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Thus, a putative class representative is powerless to diminish the "claims of the [other] individual class members" before a class has been certified.

A. *A named plaintiff cannot alter absent class members' claims before class certification.* It is well settled that absent class members are not parties to

a putative class action *before* a class has been certified. *See Smith*, 131 S. Ct. at 2379 (rejecting the "novel and surely erroneous argument that a nonnamed class member is a party to the class action litigation *before the class is certified*"). Only where a court concludes that adequacy of representation and the other requirements for class certification have been met can "nonnamed class members [become] parties to the proceedings in the sense of being bound by the" outcome because their interests have been represented by another person. *Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002); *see also Phillips Petroleum Co.*, 472 U.S. at 811–12. Accordingly, "the mere proposal of a class . . . c[an] not bind persons who [a]re not parties" to the case because, "in the absence of a certification," the "precondition for binding [nonparties]"—adequate representation by a duly appointed class representative—"[is] not met." *Smith*, 131 S. Ct. at 2380, 2382; *see also id.* at 2380 ("Neither a proposed class action nor a rejected class action may bind nonparties."); *id.* at 2381 n.11 ("The great weight of scholarly authority . . . agrees that an uncertified class action cannot bind proposed class members.").

Indeed, faced with this Court's decision in *Smith*, Plaintiff himself conceded as much below, acknowledging "that merely filing a proposed class action will not 'bind' proposed class members." Pet. App. 27a. To hold otherwise would violate the due process rights of the absent class members because they are not parties to the still-uncertified class action and are not represented by the still-undesignated class representative. *Smith*, 131 S. Ct. at 2379; *see also Richards v. Jefferson County*, 517 U.S. 793, 794 (1996) ("[I]t would violate the Due Process Clause of the Fourteenth Amendment to bind litigants to a

judgment rendered in an earlier litigation to which they were not parties and in which they were not adequately represented.").

Plaintiff's lack of representative authority at the time of removal means that he was powerless to reduce the "claims of the individual class members" to evade CAFA's jurisdictional threshold. 28 U.S.C. § 1332(d)(6). Nothing that a named plaintiff says or does before class certification can have any binding effect on the claims of individual members of the class who are not before the court. *See Frederick v. Hartford Underwriters Ins. Co.*, 683 F.3d 1242, 1247 (10th Cir. 2012) ("[A] plaintiff's attempt to limit damages in the complaint is not dispositive when determining the amount in controversy.").[8]

At the very most, then, Plaintiff could reduce the amount of his own "claim"—not those of any other member of the putative class—through his stipulation. *See Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 831 (7th Cir. 2011) ("What [the named plaintiff] is willing to accept thus does not bind the class and therefore does not ensure that the stakes fall under $5 million."); *Pfizer, Inc. v. Lott*, 417 F.3d 725, 725 (7th Cir. 2005) (a stipulation by the named plaintiffs regarding damages "would not bind the other members of the class"); *Manguno v.*

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[8] Nor was the district court correct to hold that Plaintiff had defeated federal diversity jurisdiction because his stipulation "would . . . judicially estop[him] from . . . attempting to recover more than the amount contemplated in the stipulation." Pet. App. 11a. Even if the district court were correct about principles of estoppel law, the possibility of such a future development—the eventual application by a state court of judicial estoppel—cannot defeat federal diversity jurisdiction that exists at the time of removal. *See St. Paul Mercury*, 303 U.S. at 289.

Prudential Prop. & Cas. Ins. Co., 276 F.3d 720, 724 (5th Cir. 2002) ("[I]t is improbable that [plaintiff] can ethically unilaterally waive the rights of the putative class members to attorney's fees without their authorization.").[9]

B. ***The ability to opt out of a class is no substitute for Rule 23 or due process requirements.*** The district court found that these class action and due process principles were no obstacle to remand because, in its view, the rights of absent class members would supposedly be protected by their ability to opt out of the class if and when it is certified. *See* Pet. App. 14a ("[P]utative class members may simply opt out of the class and pursue their own remedies if they feel that the limitations placed on the class by Plaintiff are too restrictive."). But the fact that members of the putative class might have the opportunity to opt out in the event a class is certified in the future does not change the fact that, *at the time of removal*, Plaintiff lacked the authority to represent the absent class members and thus could not diminish their "claims" for purposes of CAFA jurisdiction. The amount in controversy, if satisfied at the time of removal, cannot be altered by events subsequent to removal. *See St. Paul Mercury*, 303 U.S. at 293; *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824) (Marshall, C.J.) ("It is quite clear, that the jurisdiction of the Court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events."); *see also* Pl.'s Brief

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[9] Plaintiff did not even attempt to demonstrate below that, if his individual claim is reduced by stipulation (even to a *de minimis* amount), the aggregated total of the "claims" of the remaining "individual class members" would be $5,000,000 or less. 28 U.S.C. § 1332(d)(6).

in Opp. to Pet. at 12 (conceding that the question before this Court is "whether the stipulation is binding *now*").

Moreover, the right of absent class members to opt out does not change the fact that absent class members can only be bound by a class representative's actions where "the named plaintiff . . . adequately represent[s] the[ir] interests." *Phillips Petroleum Co.*, 472 U.S. at 811–12. As Federal Rule of Civil Procedure 23 itself makes clear, opt-out rights are no substitute for the adequacy of representation mandated by Rule 23(a). The Rule requires adequacy of representation as a prerequisite to *all* class actions—even those categories of class actions in which absent class members are afforded opt-out rights. *See* Fed. R. Civ. P. 23(a)(4); *see also Wal-Mart*, 131 S. Ct. at 2550 (the requirements of Rule 23 exist to "ensure[ ] that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate"); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (noting that the right to opt out is "[i]n addition to satisfying Rule 23(a)'s prerequisites").

As the Court has time and again emphasized, this is because of "our 'deep-rooted historic tradition that everyone should have his own day in court.'" *Richards*, 517 U.S. at 798 (quoting *Martin v. Wilks*, 490 U.S. 755, 762 (1989)). There are only narrow exceptions to this "principle of general application in Anglo-American jurisprudence." *Hansberry v. Lee*, 311 U.S. 32, 40 (1940); *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (same). One of those exceptions is that, "[i]n a class action, . . . a person not named as a party may be bound by a judgment on the merits of the action, *if* she was adequately represented by a party who actively participated in

the litigation." *Taylor*, 553 U.S. at 884 (emphasis added); *see also Smith*, 131 S. Ct. at 2380 ("[U]nnamed members of a class action [may] be bound, even though they are not parties to the suit.").

The district court therefore erred when it permitted Plaintiff—a putative class representative who has no authority over other potential class members who at this point are "strangers to the litigation," *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007)—to use a stipulation to circumvent CAFA's jurisdictional threshold.

III. Even If The "Legal Certainty" Framework That Courts Apply Under Section 1332(a) Were Engrafted Onto CAFA, Remand Was Improper.

This Court established long ago under the traditional diversity statute, Section 1332(a), that a party can defeat federal jurisdiction on the basis of the amount in controversy only "if, from the face of the pleadings, it is apparent, *to a legal certainty*, that the plaintiff cannot recover" the threshold amount, or if "the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount." *St. Paul Mercury*, 303 U.S. at 289 (emphasis added). Thus, the Court in *St. Paul Mercury* held that a plaintiff's amendment subsequent to removal reducing the amount he is seeking to recover cannot require a remand because that would subject the defendant's statutory right of removal "to the plaintiff's caprice." *Id.* at 294.

Applying this Court's decision in *St. Paul Mercury*, the Eighth Circuit has used a burden-shifting framework to determine the propriety of federal diversity jurisdiction. First, "a party seeking to re-

move . . . must establish the amount in controversy by a preponderance of the evidence regardless of whether the complaint alleges an amount below the jurisdictional minimum." *Bell*, 557 F.3d at 958. Then, "[i]f the [removing defendants] prove by a preponderance of the evidence that the amount in controversy is satisfied, remand is only appropriate if [the plaintiff] can establish that it is legally impossible to recover in excess of the jurisdictional minimum." *Id.* at 959 (citing *St. Paul Mercury*, 303 U.S. at 288–89). The district court below applied this test, and Plaintiff has never disputed its correctness.

As demonstrated above, there was no need for the district court to resort to this judicially-fashioned test in this case. Unlike jurisdictional determinations under Section 1332(a), which focus only on the amount sought in recovery, under CAFA's plain statutory language, the district court's calculation of the aggregated total of the "claims of the individual class members" is controlling for jurisdictional purposes. But even if the legal-certainty framework could be engrafted onto CAFA, Plaintiff still would not be entitled to a remand.

That is because, before Plaintiff can take *any* actions to bind the absent class members, the trial court would have to appoint Plaintiff as class representative, which would require determining that Plaintiff has satisfied the Arkansas standards for certifying a class action, including the requirement that Plaintiff is an adequate representative of the absent class members who will protect their interests. *See* Ark. R. Civ. P. 23(a)(4); *Smith*, 131 S. Ct. at 2379; *AT&T Mobility*, 131 S. Ct. at 1751 ("For a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members, and absent

members must be afforded notice, an opportunity to be heard, and a right to opt out of the class."). In addition to determining whether to appoint Plaintiff as class representative, before enforcing the stipulation the court also would need to ensure, at some point in the future, that enforcement of the stipulation is in the best interests of the class. These events had not occurred as of the time of removal; nor were they certain to occur in the future.

Moreover, even if those events might occur at some point in the future, as the Court in *St. Paul Mercury* held, "events occurring subsequent to removal which reduce the amount recoverable, whether beyond the plaintiff's control or the result of his volition, do not oust the district court's jurisdiction once it has attached." 303 U.S. at 293. Since any binding effect of the stipulation *on the absent individual class members* is contingent on future class certification rulings that post-date the time of removal, the district court's ruling that Plaintiff's stipulation "satisf[ies] the plaintiff's legal certainty burden and defeat[s] removal" is simply wrong as a matter of law. Pet. App. 9a.

In fact, because Plaintiff lacked the authority to bind the absent class members at the time of removal, he did not and cannot rule out the possibility that another individual class member might intervene in this action to pursue damages in excess of the jurisdictional threshold. *See* Ark. R. Civ. P. 24(a). It is altogether possible Plaintiff might be found to be an inadequate class representative and replaced by a representative unwilling to stipulate away a portion of the class's potential recovery. *See* Ark. R. Civ. P. 23(a)(4); *see also Back Doctors*, 637 F.3d at 830 ("[A class action plaintiff] has a fiduciary duty to its fellow class members. A representative can't throw

away what could be a major component of the class's recovery."). As the Seventh Circuit explained in *Back Doctors*, where the putative class representative purported to waive punitive damages, federal jurisdiction exists "unless recovery of an amount exceeding the jurisdictional minimum is legally impossible"—which means accounting for the possibility that, for example, "some other person, more willing to seek punitive damages, [might] take over as representative," or that a jury might "award damages not requested by the complaint." *Id.* at 830–31; *see also Ditcharo v. United Parcel Serv., Inc.*, 376 F. App'x 432, 438 (5th Cir. 2010) (per curiam) (denying remand as inappropriate where "unnamed plaintiffs in the class would likely seek damages in excess of [the jurisdictional minimum] if this class were certified and the case were to move forward"). The binding effectiveness on the absent individual class members of Plaintiff's stipulation is contingent on multiple future events and, therefore, it is legally impossible for the stipulation to satisfy Plaintiff's "legal certainty" burden.

Finally, the district court's ruling that such future developments could provide Standard Fire "the right to remove again, should removal be justified," Pet. App. 13a, misses the point. Federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.). Forcing out-of-state defendants to litigate in state court until all future contingencies are resolved inverts the legal certainty standard, *see St. Paul Mercury*, 303 U.S. at 288–89, and would directly contravene CAFA's intent to eliminate state court class action abuses and to afford a federal forum for just this type of case.

CONCLUSION

For the foregoing reasons, the district court's order remanding this case to Arkansas state court should be reversed.

Respectfully submitted.

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October 22, 2012

ADDENDUM

Public Law 109-2
109th Congress

An Act

Feb. 18, 2005
[S. 5]

To amend the procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and defendants, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Class Action Fairness Act of 2005.

SECTION 1. SHORT TITLE; REFERENCE; TABLE OF CONTENTS.

25 USC 1 note.

(a) SHORT TITLE.—This Act may be cited as the "Class Action Fairness Act of 2005".

(b) REFERENCE.—Whenever in this Act reference is made to an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 28, United States Code.

(c) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

Sec. 1. Short title; reference; table of contents.
Sec. 2. Findings and purposes.
Sec. 3. Consumer class action bill of rights and improved procedures for

interstate class actions.
Sec. 4. Federal district court jurisdiction for interstate class actions.
Sec. 5. Removal of interstate class actions to Federal district court.
Sec. 6. Report on class action settlements.
Sec. 7. Enactment of Judicial Conference recommendations.
Sec. 8. Rulemaking authority of Supreme Court and Judicial Conference.
Sec. 9. Effective date.

28 USC 1711 note.

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—Congress finds the following:

(1) Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.

(2) Over the past decade, there have been abuses of the class action device that have—

(A) harmed class members with legitimate claims and defendants that have acted responsibly;

(B) adversely affected interstate commerce; and

(C) undermined public respect for

our judicial system.

(3) Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where—

(A) counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value;

(B) unjustified awards are made to certain plaintiffs at the expense of other class members; and

(C) confusing notices are published that prevent class members from being able to fully understand and effectively exercise their rights.

(4) Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are—

(A) keeping cases of national importance out of Federal court;

(B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and

(C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.

(b) PURPOSES.—The purposes of this Act are to—

(1) assure fair and prompt recoveries for class members with legitimate claims;

(2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and

(3) benefit society by encouraging innovation and lowering consumer prices.

SEC. 3. CONSUMER CLASS ACTION BILL OF RIGHTS AND IMPROVED PROCEDURES FOR INTERSTATE CLASS ACTIONS.

(a) IN GENERAL.—Part V is amended by inserting after chapter 113 the following:

"CHAPTER 114—CLASS ACTIONS

"Sec.
"1711. Definitions.
"1712. Coupon settlements.
"1713. Protection against loss by class members.
"1714. Protection against discrimination based on geographic location.
"1715. Notifications to appropriate Federal and State officials.

"§ 1711. Definitions

"In this chapter:

"(1) CLASS.—The term 'class' means all of the class members in a class action.

"(2) CLASS ACTION.—The term 'class action' means any civil action filed in a district court of the United States under rule 23 of the Federal Rules of Civil Procedure or any civil action that is removed to a district court of the United States that was originally filed under a State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representatives as a class action.

"(3) CLASS COUNSEL.—The term 'class counsel' means the persons who serve as the attorneys for the class members in a proposed or certified class action.

"(4) CLASS MEMBERS.—The term 'class members' means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

"(5) PLAINTIFF CLASS ACTION.—The term 'plaintiff class action' means a class action in which class members are plaintiffs.

"(6) PROPOSED SETTLEMENT.—The term 'proposed settlement' means an

agreement regarding a class action that is subject to court approval and that, if approved, would be binding on some or all class members.

"§ 1712. Coupon settlements

"(a) CONTINGENT FEES IN COUPON SETTLEMENTS.—If a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed.

"(b) OTHER ATTORNEY'S FEE AWARDS IN COUPON SETTLEMENTS.—

"(1) IN GENERAL.—If a proposed settlement in a class action provides for a recovery of coupons to class members, and a portion of the recovery of the coupons is not used to determine the attorney's fee to be paid to class counsel, any attorney's fee award shall be based upon the amount of time class counsel reasonably expended working on the action.

"(2) COURT APPROVAL.—Any attorney's fee under this subsection shall be subject to approval by the court and shall include an appropriate attorney's fee, if any, for obtaining equitable relief, including an injunction, if applicable. Nothing in this

subsection shall be construed to prohibit application of a lodestar with a multiplier method of determining attorney's fees.

"(c) ATTORNEY'S FEE AWARDS CALCULATED ON A MIXED BASIS IN COUPON SETTLEMENTS.—If a proposed settlement in a class action provides for an award of coupons to class members and also provides for equitable relief, including injunctive relief—

"(1) that portion of the attorney's fee to be paid to class counsel that is based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (a); and

"(2) that portion of the attorney's fee to be paid to class counsel that is not based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (b).

"(d) SETTLEMENT VALUATION EXPERTISE.—In a class action involving the awarding of coupons, the court may, in its discretion upon the motion of a party, receive expert testimony from a witness qualified to provide information on the actual value to the class members of the coupons that are redeemed.

"(e) JUDICIAL SCRUTINY OF COUPON SETTLEMENTS.—In a proposed settlement under which class

members would be awarded coupons, the court may approve the proposed settlement only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members. The court, in its discretion, may also require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations, as agreed to by the parties. The distribution and redemption of any proceeds under this subsection shall not be used to calculate attorneys' fees under this section.

"§ 1713. Protection against loss by class members

"The court may approve a proposed settlement under which any class member is obligated to pay sums to class counsel that would result in a net loss to the class member only if the court makes a written finding that nonmonetary benefits to the class member substantially outweigh the monetary loss.

"§ 1714. Protection against discrimination based on geographic location

"The court may not approve a proposed settlement that provides for the payment of greater sums to some

class members than to others solely on the basis that the class members to whom the greater sums are to be paid are located in closer geographic proximity to the court.

"§ 1715. Notifications to appropriate Federal and State officials

"(a) DEFINITIONS.—

"(1) APPROPRIATE FEDERAL OFFICIAL.—In this section, the term 'appropriate Federal official' means—

"(A) the Attorney General of the United States; or

"(B) in any case in which the defendant is a Federal depository institution, a State depository institution, a depository institution holding company, a foreign bank, or a nondepository institution subsidiary of the foregoing (as such terms are defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)), the person who has the primary Federal regulatory or supervisory responsibility with respect to the defendant, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person.

"(2) APPROPRIATE STATE OFFICIAL.—In this section, the term 'appropriate State official' means the person in the State who has the primary regulatory or supervisory responsibility with respect to the defendant, or who

licenses or otherwise authorizes the defendant to conduct business in the State, if some or all of the matters alleged in the class action are subject to regulation by that person. If there is no primary regulator, supervisor, or licensing authority, or the matters alleged in the class action are not subject to regulation or supervision by that person, then the appropriate State official shall be the State attorney general.

Deadline.

"(b) IN GENERAL.—Not later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement consisting of—

"(1) a copy of the complaint and any materials filed with the complaint and any amended complaints (except such materials shall not be required to be served if such materials are made electronically available through the Internet and such service includes notice of how to electronically access such material);

"(2) notice of any scheduled judicial hearing in the class action;

"(3) any proposed or final notifica-

tion to class members of—

"(A)(i) the members' rights to request exclusion from the class action; or

"(ii) if no right to request exclusion exists, a statement that no such right exists; and

"(B) a proposed settlement of a class action;

"(4) any proposed or final class action settlement;

"(5) any settlement or other agreement contemporaneously made between class counsel and counsel for the defendants;

"(6) any final judgment or notice of dismissal;

"(7)(A) if feasible, the names of class members who reside in each State and the estimated proportionate share of the claims of such members to the entire settlement to that State's appropriate State official; or

"(B) if the provision of information under subparagraph (A) is not feasible, a reasonable estimate of the number of class members residing in each State and the estimated proportionate share of the claims of such members to the entire settlement; and

"(8) any written judicial opinion

relating to the materials described under subparagraphs (3) through (6).

"(c) DEPOSITORY INSTITUTIONS NOTIFICATION.—

"(1) FEDERAL AND OTHER DEPOSITORY INSTITUTIONS.—In any case in which the defendant is a Federal depository institution, a depository institution holding company, a foreign bank, or a non-depository institution subsidiary of the foregoing, the notice requirements of this section are satisfied by serving the notice required under subsection (b) upon the person who has the primary Federal regulatory or supervisory responsibility with respect to the defendant, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person.

"(2) STATE DEPOSITORY INSTITUTIONS.—In any case in which the defendant is a State depository institution (as that term is defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)), the notice requirements of this section are satisfied by serving the notice required under subsection (b) upon the State bank supervisor (as that term is defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)) of the State in which the defendant is incorporated or chartered,

if some or all of the matters alleged in the class action are subject to regulation or supervision by that person, and upon the appropriate Federal official.

"(d) FINAL APPROVAL.—An order giving final approval of a proposed settlement may not be issued earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate State official are served with the notice required under subsection (b).

"(e) NONCOMPLIANCE IF NOTICE NOT PROVIDED.—

"(1) IN GENERAL.—A class member may refuse to comply with and may choose not to be bound by a settlement agreement or consent decree in a class action if the class member demonstrates that the notice required under subsection (b) has not been provided.

"(2) LIMITATION.—A class member may not refuse to comply with or to be bound by a settlement agreement or consent decree under paragraph (1) if the notice required under subsection (b) was directed to the appropriate Federal official and to either the State attorney general or the person that has primary regulatory, supervisory, or licensing authority over the defendant.

"(3) APPLICATION OF RIGHTS.—The rights created by this subsection shall apply only to class members or any person acting on a class member's behalf, and shall not be construed to limit any other rights affecting a class member's participation in the settlement.

"(f) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to expand the authority of, or impose any obligations, duties, or responsibilities upon, Federal or State officials.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of chapters for part V is amended by inserting after the item relating to chapter 113 the following:

"114. Class Actions.....1711".

SEC. 4. FEDERAL DISTRICT COURT JURISDICTION FOR INTERSTATE CLASS ACTIONS.

(a) APPLICATION OF FEDERAL DIVERSITY JURISDICTION.—Section 1332 is amended—

(1) by redesignating subsection (d) as subsection (e); and

(2) by inserting after subsection (c) the following:

"(d)(1) In this subsection—

"(A) the term 'class' means all of

the class members in a class action;

"(B) the term 'class action' means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

"(C) the term 'class certification order' means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

"(D) the term 'class members' means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

"(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—

"(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

"(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

"(C) any member of a class of plaintiffs is a citizen of a State and

any defendant is a foreign state or a citizen or subject of a foreign state.

"(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of—

"(A) whether the claims asserted involve matters of national or interstate interest;

"(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

"(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

"(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

"(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and

the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

"(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

"(4) A district court shall decline to exercise jurisdiction under paragraph (2)—

"(A)(i) over a class action in which—

"(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

"(II) at least 1 defendant is a defendant—

"(aa) from whom significant relief is sought by members of the plaintiff class;

"(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

"(cc) who is a citizen of the State in which the action was originally filed; and

"(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

"(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

"(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

"(5) Paragraphs (2) through (4) shall not apply to any class action in which—

"(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

"(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

"(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of

$5,000,000, exclusive of interest and costs.

"(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

"(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

"(9) Paragraph (2) shall not apply to any class action that solely involves a claim—

"(A) concerning a covered security as defined under 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

"(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

"(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

"(10) For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

"(11)(A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

"(B)(i) As used in subparagraph (A), the term 'mass action' means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

"(ii) As used in subparagraph (A), the term 'mass action' shall not include any civil action in which—

"(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

"(II) the claims are joined upon motion of a defendant;

"(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

"(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

"(C)(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

"(ii) This subparagraph will not apply—

"(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil

Procedure; or

"(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

"(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.".

(b) CONFORMING AMENDMENTS.—

(1) Section 1335(a)(1) is amended by inserting "subsection (a) or (d) of" before "section 1332".

(2) Section 1603(b)(3) is amended by striking "(d)" and inserting "(e)".

SEC. 5. REMOVAL OF INTERSTATE CLASS ACTIONS TO FEDERAL DISTRICT COURT.

(a) IN GENERAL.—Chapter 89 is amended by adding after section 1452 the following:

"§ 1453. Removal of class actions

"(a) DEFINITIONS.—In this section, the terms 'class', 'class action', 'class certification order', and 'class member' shall have the meanings given such terms under section 1332(d)(1).

"(b) IN GENERAL.—A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(b) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

"(c) REVIEW OF REMAND ORDERS.—

Applicability.

"(1) IN GENERAL.—Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not less than 7 days after entry of the order.

"(2) TIME PERIOD FOR JUDGMENT.—If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3).

"(3) EXTENSION OF TIME PERIOD.—

The court of appeals may grant an extension of the 60-day period described in paragraph (2) if—

"(A) all parties to the proceeding agree to such extension, for any period of time; or

"(B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days.

"(4) DENIAL OF APPEAL.—If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied.

"(d) EXCEPTION.—This section shall not apply to any class action that solely involves—

"(1) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

"(2) a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

"(3) a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).".

(b) TECHNICAL AND CONFORMING AMENDMENTS.—The table of sections for chapter 89 is amended by adding after the item relating to section 1452 the following:

"1453. Removal of class actions.".

SEC. 6. REPORT ON CLASS ACTION SETTLEMENTS.

(a) IN GENERAL.—Not later than 12 months after the date of enactment of this Act, the Judicial Conference of the United States, with the assistance of the Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts, shall prepare and transmit to the Committees on the Judiciary of the Senate and the House of Representatives a report on class action settlements.

(b) CONTENT.—The report under subsection (a) shall contain—

(1) recommendations on the best practices that courts can use to ensure that proposed class action settlements are fair to the class mem-

bers that the settlements are supposed to benefit;

(2) recommendations on the best practices that courts can use to ensure that—

(A) the fees and expenses awarded to counsel in connection with a class action settlement appropriately reflect the extent to which counsel succeeded in obtaining full redress for the injuries alleged and the time, expense, and risk that counsel devoted to the litigation; and

(B) the class members on whose behalf the settlement is proposed are the primary beneficiaries of the settlement; and

(3) the actions that the Judicial Conference of the United States has taken and intends to take toward having the Federal judiciary implement any or all of the recommendations contained in the report.

(c) AUTHORITY OF FEDERAL COURTS.—Nothing in this section shall be construed to alter the authority of the Federal courts to supervise attorneys' fees.

28 USC 2074 note.

SEC. 7. ENACTMENT OF JUDICIAL CONFERENCE RECOMMENDATIONS.

Notwithstanding any other provision of law, the amendments to rule

23 of the Federal Rules of Civil Procedure, which are set forth in the order entered by the Supreme Court of the United States on March 27, 2003, shall take effect on the date of enactment of this Act or on December 1, 2003 (as specified in that order), whichever occurs first.

28 USC 2071 note.

SEC. 8. RULEMAKING AUTHORITY OF SUPREME COURT AND JUDICIAL CONFERENCE.

Nothing in this Act shall restrict in any way the authority of the Judicial Conference and the Supreme Court to propose and prescribe general rules of practice and procedure under chapter 131 of title 28, United States Code.

28 USC 1332 note.

SEC. 9. EFFECTIVE DATE

The amendments made by this Act shall apply to any civil action commenced on or after the date of enactment of this Act.

Approved February 18, 2005.

LEGISLATIVE HISTORY—S. 5:

CONGRESSIONAL RECORD, Vol. 151 (2005):
Feb. 7-10, considered and passed Senate.
Feb. 17, considered and passed House.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 41 (2005):

Feb. 18, Presidential remarks.

28 U.S.C. § 1332 provides:

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of—

(A) every State and foreign state of which the insured is a citizen;

(B) every State and foreign state by which the insurer has been incorporated; and

(C) the State or foreign state where the insurer has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d)(1) In this subsection—

(A) the term "class" means all of the class members in a class action;

(B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

(C) the term "class certification order" means an order issued by a court approving the treat-

ment of some or all aspects of a civil action as a class action; and

(D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of—

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

(4) A district court shall decline to exercise jurisdiction under paragraph (2)—

(A)(i) over a class action in which—

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant—

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

(5) Paragraphs (2) through (4) shall not apply to any class action in which—

(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Feder-

al jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

(9) Paragraph (2) shall not apply to any class action that solely involves a claim—

(A) concerning a covered security as defined under 16(f)(3)[1] of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)[2]) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

(10) For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal

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[1] So in original. Reference to "16(f)(3)" probably should be preceded by "section".

[2] So in original. Probably should be "77p(f)(3)".

place of business and the State under whose laws it is organized.

(11)(A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

(B)(i) As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which—

(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

(C)(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

(ii) This subparagraph will not apply—

(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

(e) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S.C. § 1446 provides:

§ 1446. Procedure for removal of civil actions

(a) Generally.—A defendant or defendants desiring to remove any civil action from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) Requirements; generally.—(1) The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

(2)(A) When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action.

(B) Each defendant shall have 30 days after receipt by or service on that defendant of the initial pleading or summons described in paragraph (1) to file the notice of removal.

(C) If defendants are served at different times, and a later-served defendant files a notice of removal, any earlier-served defendant may

consent to the removal even though that earlier-served defendant did not previously initiate or consent to removal.

(3) Except as provided in subsection (c), if the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

(c) Requirements; removal based on diversity of citizenship.—(1) A case may not be removed under subsection (b)(3) on the basis of jurisdiction conferred by section 1332 more than 1 year after commencement of the action, unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action.

(2) If removal of a civil action is sought on the basis of the jurisdiction conferred by section 1332(a), the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy, except that—

(A) the notice of removal may assert the amount in controversy if the initial pleading seeks--

(i) nonmonetary relief; or

(ii) a money judgment, but the State practice either does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded; and

(B) removal of the action is proper on the basis of an amount in controversy asserted under

subparagraph (A) if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in section 1332(a).

(3)(A) If the case stated by the initial pleading is not removable solely because the amount in controversy does not exceed the amount specified in section 1332(a), information relating to the amount in controversy in the record of the State proceeding, or in responses to discovery, shall be treated as an 'other paper' under subsection (b)(3).

(B) If the notice of removal is filed more than 1 year after commencement of the action and the district court finds that the plaintiff deliberately failed to disclose the actual amount in controversy to prevent removal, that finding shall be deemed bad faith under paragraph (1).

(d) Notice to adverse parties and State court.—Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(e) Counterclaim in 337 proceeding.—With respect to any counterclaim removed to a district court pursuant to section 337(c) of the Tariff Act of 1930, the district court shall resolve such counterclaim in the same manner as an original complaint under the Federal Rules of Civil Procedure, except that the payment of a filing fee shall not be required in such cases and the counterclaim shall relate back to the date of the original complaint in the proceeding be-

fore the International Trade Commission under section 337 of that Act.

[(f) Redesignated (e)]

(g) Where the civil action or criminal prosecution that is removable under section 1442(a) is a proceeding in which a judicial order for testimony or documents is sought or issued or sought to be enforced, the 30-day requirement of subsection (b) of this section and paragraph (1) of section 1455(b) is satisfied if the person or entity desiring to remove the proceeding files the notice of removal not later than 30 days after receiving, through service, notice of any such proceeding.

28 U.S.C. § 1453 provides:

§ 1453. Removal of class actions

(a) Definitions.—In this section, the terms "class", "class action", "class certification order", and "class member" shall have the meanings given such terms under section 1332(d)(1).

(b) In general.—A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(c)(1) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

(c) Review of remand orders.—

(1) In general.—Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not more than 10 days after entry of the order.

(2) Time period for judgment.—If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3).

(3) Extension of time period.—The court of appeals may grant an extension of the 60-day period described in paragraph (2) if—

(A) all parties to the proceeding agree to such extension, for any period of time; or

(B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days.

(4) Denial of appeal.—If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied.

(d) Exception.—This section shall not apply to any class action that solely involves—

(1) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)[1]) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(2) a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(3) a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

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[1] So in original. Probably should be "77p(f)(3)".

RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
NOV 28 2012
OFFICE OF THE CLERK

No. 11-1450

IN THE
Supreme Court of the United States

THE STANDARD FIRE INSURANCE COMPANY,
Petitioner,

v.

GREG KNOWLES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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QUESTION PRESENTED

Whether the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4, forecloses a court in a putative class action from relying on a stipulation by the named plaintiff, together with associated factual allegations in the plaintiff's complaint, limiting the damages sought to less than the $5,000,000 CAFA threshold for federal jurisdiction in deciding a motion to remand to state court a case removed to federal court under CAFA.

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INTRODUCTION

The Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4, enables defendants to remove putative class actions to federal court when certain requirements are met, including that "the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs." 28 U.S.C. § 1332(d)(2). Courts interpreting the parallel language in the general diversity-jurisdiction statute, 28 U.S.C. § 1332(a), have long recognized that "[i]f [the plaintiff] does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove." *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938). In enacting CAFA, "Congress presumably knew how [§ 1332(a)] had been construed, and presumably intended [§ 1332(d)(2)] to bear the same meaning." *United States v. Hayes*, 555 U.S. 415, 424 (2009) (citing *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85-86 (2006)).

Here, respondent, the named plaintiff in a putative class action, limited the damages sought in his state-court complaint raising exclusively state-law issues on behalf of only Arkansas residents to less than the $5,000,000 CAFA threshold for federal jurisdiction. Respondent also filed a binding stipulation with the state court expressly disavowing any greater damages. After petitioner The Standard Fire Insurance Company ("Standard Fire") removed the case to federal court, the district court granted respondent's motion to remand the case to state court, correctly holding that the complaint and stipulation were con-

trolling in establishing that the $5,000,000 amount-in-controversy requirement was not met.

Seeking to have the district court's remand order overturned, Standard Fire argues that a different provision of CAFA, 28 U.S.C. § 1332(d)(6), precludes district courts from relying on the amount in controversy alleged in the complaint and established through a binding stipulation. According to Standard Fire, that provision – which states that "the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000," *id.* – requires federal district courts to conduct full-blown evidentiary hearings at the removal stage to determine the amount in controversy in every CAFA case in which the jurisdictional amount is disputed.

Standard Fire's statutory interpretation is incorrect. The point of § 1332(d)(6) is to displace in CAFA cases the rule of *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), which prohibits courts from aggregating the claims of individual class members to satisfy the amount-in-controversy requirement of the general diversity statute. Section 1332(d)(6) does not override the traditional principle that the named plaintiff, as the master of the complaint, determines the content of the class members' claims at the pleading stage, including whether those claims exceed, in the aggregate, CAFA's jurisdictional amount.

In addition, Standard Fire's theory conflicts with CAFA's purposes and history, which were to address multi-state class actions asserting large damages filed in state courts while retaining state-court jurisdiction for small-damages, intra-state class actions. Standard Fire's approach also produces an unwork-

able jurisdictional regime that would force district courts to grapple with factually intensive merits inquiries at the outset of the case to determine their jurisdiction – a result that flatly contradicts the well-settled principles governing the interpretation of jurisdictional statutes.

Following the settled jurisdictional rule recognized nearly 75 years ago in *St. Paul Mercury* and applied by lower federal courts ever since does not violate the due process rights of absent class members, as Standard Fire claims. Unless and until a class is certified, any limitation on the amount in controversy contained in the complaint or an accompanying stipulation has no effect on the merits of absent class members' claims.

STATEMENT

A. Statutory Background

"Subject to certain limitations, the CAFA confers federal diversity jurisdiction over class actions where the aggregate amount in controversy exceeds $5 million." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 571 (2005). In particular, CAFA extends federal subject-matter jurisdiction to class actions when three conditions are met: (1) an aggregate amount in controversy exceeding $5,000,000; (2) a putative class with 100 or more members; and (3) minimal diversity, *i.e.*, a class in which at least one member is a citizen of a different state from any defendant. 28 U.S.C. § 1332(d)(2), (5)(B).[1]

CAFA provides that, "[i]n any class action, the claims of the individual class members shall be

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[1] The relevant portions of CAFA are set forth in Addendum A to this brief.

aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs." *Id.* § 1332(d)(6). CAFA thereby alters by statute the rule against aggregating the claims of putative class members recognized in *Zahn*.

Section 2(b) of CAFA states that one of "[t]he purposes of th[e] Act" is to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of *interstate cases of national importance* under diversity jurisdiction." 28 U.S.C. § 1711 note (emphasis added). The CAFA Committee Report explained that the legislation was needed to address nationwide or multi-state class actions, whose enormous size creates pressure on defendants to settle, regardless of the merits of the clams: "[W]hen plaintiffs seek hundreds of millions of dollars in damages, basic economics can force a corporation to settle the suit, even if it is meritless and has only a five percent chance of success." S. Rep. No. 109-14, at 21 (2005) ("S. Rep." or "CAFA Report"). CAFA reflects the judgment that large interstate class actions "properly belong in federal court." *Id.* at 5.

The Report referred to the issue of "nationwide" or "multi-state" class actions, *id.* at 4, 11, 12, 22, 23, 25, 37, and "magnet" jurisdictions attracting claims from non-residents of the state, *id.* at 22-23. "The effect of class action abuses in state courts is being exacerbated by the trend toward 'nationwide' class actions, which invite one state court to dictate to 49 others what their laws should be on a particular issue, thereby undermining basic federalism principles." *Id.* at 24. Further, "most of the class actions brought in Madison County[, Illinois,] and other magnet

courts had little – if anything – to do with the venues where they were brought." *Id.* at 13; *see also id.* at 37 (citing "the filing of lawsuits in out-of-the-way 'magnet' state courts that have no real relationship to the controversy at hand"). The Report found that "current law enables lawyers to 'game' the procedural rules and keep nationwide or multi-state class actions in state courts." *Id.* at 4; *see also id.* at 6 (referring to "[i]nterstate class actions which often involve millions of parties from numerous states").

CAFA does not create subject-matter jurisdiction over all class actions with minimal diversity. In fact, "CAFA originally included a $2 million amount in controversy requirement, but it was increased to $5 million after the Congressional Budget Office [("CBO")] reported that 'the bill would impose additional costs on the Federal district court system' since most class-action lawsuits would likely satisfy the $2 million requirement." *Lewis v. Verizon Communications, Inc.*, 627 F.3d 395, 398 (9th Cir. 2010) (quoting Letter from Dan L. Crippen, Dir., CBO, to F. James Sensenbrenner, Jr., Chairman, Comm. on the Judiciary, U.S. House of Representatives (Mar. 11, 2002), *reprinted in* H.R. Rep. No. 107-370, at 27 (2002)). The CAFA Report explains that CAFA "appropriately leaves certain 'intrastate' class actions in state court: cases involving small amounts in controversy." S. Rep. at 61.

In enacting CAFA, Congress also considered whether to eliminate familiar principles and practices of diversity jurisdiction. The CAFA Report stated that "questions arise in current practice on jurisdictional issues. Well-established law exists to resolve these questions, and [CAFA] does not change – or even complicate – the answers to these

questions. In short, the 'rules of the road' on such issues are already established, and [CAFA] does not change them." *Id.* at 70.

The Report reiterated the need for a streamlined jurisdictional inquiry and explained that a putative class representative could enter into a *factual stipulation* on which a court could rely to make a jurisdictional determination at the outset of the case:

> The Committee understands that in assessing the various criteria established in all these new jurisdictional provisions, a federal court may have to engage in some fact-finding, not unlike what is necessitated by the existing jurisdictional statutes. The Committee further understands that in some instances, limited discovery may be necessary to make these determinations. However, the Committee cautions that these jurisdictional determinations should be made largely on the basis of readily available information. . . . Less burdensome means (e.g., *factual stipulations*) should be used in creating a record upon which the jurisdictional determinations can be made.

Id. at 44 (emphasis added).

B. Procedural History

1. **The State-Court Proceeding.** On April 13, 2011, respondent Greg Knowles filed this putative class action in the Circuit Court of Miller County, Arkansas, alleging only state-law claims, proposing a class limited to Arkansas residents, and expressly seeking less than the federal jurisdictional threshold. Pet. App. 2-3.

The gravamen of respondent's claim was that Standard Fire breached its insurance contract by underpaying claims for loss or damage to real property pursuant to homeowners' policies issued to Arkansas residents. *Id.* at 3. Specifically, respondent alleged that Standard Fire failed to pay for charges reasonably associated with retaining the services of a general contractor to repair or replace damaged property. These charges, known as general contractors' overhead and profit ("GCOP"), represent an extra 20% fee routinely assessed by contractors when repairing damaged property. *Id.* Although the homeowners' insurance policies obligated Standard Fire to pay GCOP, it failed to do so. By not covering those costs, Standard Fire violated its contracts with the Arkansas residents who procured insurance from it in the period at issue.

The body of the complaint stated that "neither Plaintiff's nor any individual Class Member's claim is equal to or greater than seventy-five thousand dollars ($75,000), inclusive of costs and attorneys fees. Plaintiff expressly stipulates to seek less than $75,000 total recovery, inclusive of costs and attorneys fees, individually or on behalf of any Class Member. Moreover, the total aggregate damages of the Plaintiff and all Class Members, inclusive of costs and attorneys' fees, are less than five million dollars ($5,000,000), and the Plaintiff and Class stipulate they will seek to recover total aggregate damages of less than five million dollars ($5,000,000)." *Id.* at 59-60 (citation omitted). The Prayer for Relief was expressly limited to these amounts and repeated that all elements of damages, costs, and fees "will not exceed $75,000 for Plaintiff individually or any Class

Member individually and/or $5,000,000 for the entire Class combined." *Id.* at 72-73.

Respondent attached as an exhibit to the complaint a "Sworn and Binding Stipulation," signed by respondent, which provided:

> I do hereby swear and affirm that I do not now, and will not at any time during this case, whether it be removed, remanded, or otherwise, seek damages for myself or any other individual class member in excess of $75,000 (inclusive of costs and attorneys' fees) or seek damages for the class as alleged in the complaint to which this stipulation is attached in excess of $5,000,000 in the aggregate (inclusive of costs and attorneys' fees).
>
> I understand that this stipulation is binding, and it is my intent to be bound by it.

Id. at 75.

2. Standard Fire's Removal. Standard Fire filed a notice of removal pursuant to CAFA. *See* Pet. App. 36. Standard Fire asserted that the amount in controversy exceeded $5,000,000 based on the following calculations:

- First, Standard Fire stated that a review of its records regarding payments and deductibles on those claims falling within the definition of the proposed class indicated that the aggregate total of payments for structural losses and deductibles was $15,274,806. *Id.* at 43.[2] Using the 20%

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[2] Standard Fire subsequently submitted the Affidavit of Brian Harton, director of product management and a business analysis lead at Standard Fire, who confirmed the total of

figure for GCOP contained in the complaint, Standard Fire calculated the expected damages for the class as $3,054,961. *Id.* Standard Fire's calculation assumed that it had not reimbursed any class members for GCOP.

- Standard Fire next added a 12% statutory penalty for breach of an insurance contract, based on Arkansas Code Annotated § 23-79-208(a)(1). Standard Fire computed the 12% statutory penalty as an additional $366,595, "for a potential total compensatory damages award of $3,421,556." Pet. App. 44.

- Standard Fire then added a projected award of attorneys' fees of $1,602,594. *Id.* at 45. Standard Fire derived those fees by assuming that a court would award 40% of the total of (i) the presumed recovery of $3,421,556, and (ii) two years' worth of prejudgment interest at the maximum Arkansas state-court rate of 5% above the federal discount rate. *Id.* at 45 n.4.

Respondent disputed the basis for Standard Fire's calculation (Dist. Ct. Dkt. No. 7, at 16-17) but, in accordance with settled Eighth Circuit and Arkansas district court precedent regarding the validity of binding stipulations, did not introduce evidence of his own regarding the amount in controversy.

3. The District Court's Decision. Respondent moved to remand this action to Arkansas state court, which the district court granted. Pet. App. 2. The district court accepted Standard Fire's calculations of expected GCOP damages for the class of $3,054,961,

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$15,274,806 of payments for structural losses and deductibles. JA9a-11a.

a 12% statutory penalty for breach of contract, and projected 40% attorneys' fees computed on the basis of both compensatory damages and prejudgment interest. *Id.* at 7-8. The court explained that "this brings the total award up to $5,024,150, which exceeds the statutory maximum for state court jurisdiction by $24,150." *Id.* at 8.

Although the district court found that Standard Fire had met its initial burden of proving the requisite amount in controversy by a preponderance of the evidence, it held that respondent's stipulation demonstrated to a legal certainty that the claim fell under the $5,000,000 jurisdictional threshold. *Id.* at 8-9. The court opined that the stipulation was binding under Arkansas law, *id.* at 11-12, and rejected the argument that it was made in bad faith, *id.* at 14. The court noted that, if respondent attempted to amend the complaint in the future to increase the amount of recovery sought, the case would be removable at that time. *Id.* at 12.

On January 4, 2012, the Eighth Circuit denied Standard Fire's petition for permission to appeal, without recorded dissent. *Id.* at 1. On March 1, 2012, the Eighth Circuit denied Standard Fire's petition for rehearing, again without recorded dissent. *Id.* at 16.

SUMMARY OF ARGUMENT

I. In a putative state-law class action filed in state court, CAFA does not preclude a court from considering a representative plaintiff's pleading, including a stipulation attached to the complaint, in determining the amount in controversy at the time of removal. Where that stipulation is not made in bad faith and is enforceable under state law, it is controlling on the amount-in-controversy issue.

The text, purposes, and history of CAFA all demonstrate that Congress did not intend to preclude a federal district court from considering a sworn stipulation in assessing the amount in controversy. CAFA incorporates the relevant amount-in-controversy language of the diversity statute. CAFA thus reflects the longstanding principles that a plaintiff is the master of the complaint and that jurisdiction is determined at the time of removal based on the plaintiff's pleading. The CAFA Report expressly cited the practice of jurisdictional stipulations and observed that a putative class representative could enter into "*factual stipulations*" on which a court could rely to make a jurisdictional determination. S. Rep. at 44 (emphasis added).

Standard Fire and its *amici* wrongly accuse respondent of attempting an end-run around CAFA. In fact, in this case, CAFA has operated exactly as Congress intended. Respondent's complaint is a single-state (not a multi-state or nationwide) class action. It is limited to claims under Arkansas law, proposes a class limited to Arkansas residents, and is expressly capped at less than the federal jurisdictional threshold. This case therefore avoids all of the concerns of "judicial blackmail," nationwide classes

in state court, and other problems at which CAFA was directed. The instant class action is exactly the kind of case that Congress determined should remain in state court.

Standard Fire's construction, in contrast, would frustrate CAFA's purposes. It would be utterly unworkable and would vastly complicate jurisdictional inquiries. It would force courts to conduct full dress rehearsals of the merits (including damages) at the outset of each case. It would require extensive discovery and fact-finding that would increase the very burdens of which Standard Fire complains in this case. Moreover, Standard Fire's position opens the door to reexamine every decision made by named plaintiffs in framing their complaints. The decision to seek damages of a certain size is no different from innumerable other choices that class representatives inevitably make as masters of their complaints, including which claims to assert and which defendants to name.

II. Considering a damages limitation at the jurisdictional stage is consistent with due process, because the limitation cannot have a binding effect on the merits of absent class members' claims unless and until the class is certified. As with any jurisdictional inquiry, the amount-in-controversy determination does not adjudicate the merits of the claims of absent class members. *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011), has no application here.

III. Many of the arguments advanced by Standard Fire and its *amici* in this case are offensive *ad hominem* attacks, plain and simple. Jurisdictional stipulations may be disregarded if they are made in bad faith or have no plausible basis. A defendant may

remove a case to federal court if a damages limitation is subsequently amended to exceed the jurisdictional threshold.

Standard Fire and its *amici* spill much ink attacking the Arkansas judiciary. The allegations of "abuse" gain no credibility simply by dint of repetition throughout the *amici* briefs. The allegations are demonstrably untrue, and Standard Fire's indignant tone is misplaced. By Standard Fire's own calculations, the aggregated damages for the class of Arkansas policyholders are a mere $3,054,961. *See* Pet. App. 8. Standard Fire is able to reach (and just barely) the $5,000,000 CAFA threshold only by adding extremely generous attorneys' fees that were wholly speculative and based on an inapposite precedent involving a case with multiple trials and appeals.

IV. Even if this Court adopts Standard Fire's interpretation of CAFA, it should still affirm on the ground that the amount in controversy was not met here. At a minimum, a stipulation for a jurisdictional inquiry may be used to limit attorneys' fees while at the same time affording full damages to be recovered by absent class members.

ARGUMENT

I. UNDER CAFA, COURTS SHOULD CONSIDER NAMED PLAINTIFFS' PLEADINGS AND STIPULATIONS IN DETERMINING THE AMOUNT IN CONTROVERSY

The text, purposes, and history of CAFA all show that Congress incorporated familiar principles of the amount-in-controversy test of diversity jurisdiction. Accordingly, in ascertaining whether the CAFA jurisdictional threshold is met, a district court should analyze the pleadings, including any stipulation attached to the named plaintiff's complaint. Where a stipulation and other limitations in the pleadings are not made in bad faith and are enforceable under state law, they will be controlling on the amount-in-controversy issue.

A. CAFA's Text Does Not Preclude Courts From Considering Pleadings And Stipulations In Determining The Jurisdictional Amount In Controversy

1. CAFA's governing standard incorporates traditional principles of diversity jurisdiction

The governing standard of CAFA's amount-in-controversy test is whether "the matter in controversy exceeds the sum or value of $5,000,000." 28 U.S.C. § 1332(d)(2), (6). CAFA took this key language directly from the traditional diversity statute governing non-class actions. *See id.* § 1332(a) (whether "the matter in controversy exceeds the sum or value of $75,000"). Standard Fire admits that CAFA was

enacted as part of Congress's authority to regulate diversity jurisdiction. Pet. Br. 17.[3]

By borrowing the amount-in-controversy language directly from the diversity statute, CAFA incorporates the settled construction of that language to permit plaintiffs to establish the amount in controversy for jurisdictional purposes through pleadings and stipulations. Under the general diversity statute, it has long been the rule that "[i]f [the plaintiff] does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove." *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938). In enacting CAFA, "Congress presumably knew how [§ 1332(a)] had been construed, and presumably intended [§ 1332(d)(2)] to bear the same meaning." *United States v. Hayes*, 555 U.S. 415, 424 (2009); *accord, e.g., Bragdon v. Abbott*, 524 U.S. 624, 645 (1998). Moreover, this Court "'assume[s] that Congress is aware of existing law'" – including the rule that the plaintiff is the master of the complaint and therefore may avoid removal to federal court by suing for less than the jurisdictional amount – "'when it passes legislation.'" *Hall v. United States*, 132 S. Ct. 1882, 1889 (2012) (quoting

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[3] CAFA contains a congressional finding regarding "diversity jurisdiction." CAFA § 2(a)(4), 119 Stat. 5 (codified at 28 U.S.C. § 1711 note). CAFA states as one of its avowed "purposes" the restoration of "the intent of the framers of the United States Constitution" regarding "diversity jurisdiction." *Id.* § 2(b)(2), 119 Stat. 5 (codified at 28 U.S.C. § 1711 note). The subsection of CAFA at issue here (§ 4(a)) is entitled, "Application Of Federal Diversity Jurisdiction," 119 Stat. 9, and makes a series of amendments to the federal diversity statute, 28 U.S.C. § 1332.

Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990)); *accord Traynor v. Turnage*, 485 U.S. 535, 546 (1988); Chamber Br. 17. CAFA's text reflects Congress's intent to embrace and not to foreclose those settled principles.

In § 1332(d)(6), CAFA expressly abrogates the anti-aggregation rule of *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). CAFA thereby shifts the amount-in-controversy focus from a person-by-person analysis of individual class members to a class-wide total. Subsection (d)(6) confirms that a stipulation or other evidence that directly relates to the size of that aggregated total – the potential class-wide amount in controversy – is exactly what a court should consider under CAFA.

CAFA's statutory definitions reinforce the conclusion that, under the statute, the named plaintiff plays the familiar role of master of the complaint for jurisdictional purposes. CAFA's text recognizes that "claims" of "class members" in a "class action" do not exist in a vacuum. Rather, under CAFA, a "class action" is a "civil action . . . brought by 1 or more representative persons as a class action." 28 U.S.C. § 1332(d)(1)(B). The representative plaintiff necessarily frames "the definition of the proposed or certified class" (*id.* § 1332(d)(1)(D)) and decides what "claims of the individual class members" to assert (*id.* § 1332(d)(6)).

2. Familiar principles of diversity jurisdiction support relying on pleadings and stipulations

Several familiar principles of diversity jurisdiction, incorporated by CAFA, confirm that Congress did not intend to foreclose courts from considering a named

plaintiff's pleading and any stipulation attached to the complaint in determining the amount in controversy at the time of removal.

(a) A plaintiff is the "master" of the complaint

Traditionally, "the plaintiff is the master of the complaint." *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 91 (2005) (internal quotation marks omitted); *see also Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Thus, a plaintiff may deliberately plead a case to avoid federal jurisdiction and may enter into a binding stipulation to ensure that the amount in controversy stays below the jurisdictional minimum. This Court has long recognized that, "since the plaintiff is the master of the complaint, the well-pleaded-complaint rule enables him . . . to have the cause heard in state court" by limiting the claim to avoid federal subject-matter jurisdiction. *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002) (internal quotation marks omitted); *see, e.g., St. Paul Mercury*, 303 U.S. at 294.

That rule has been the law for more than a century. As Justice Holmes recognized, a plaintiff may frame a suit to avoid removal jurisdiction: "Of course, the party who brings a suit is master to decide what law he will rely upon." *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) (Holmes, J.); *see, e.g., Central R.R. Co. v. Mills*, 113 U.S. 249, 257 (1885); *Great North Ry. Co. v. Alexander*, 246 U.S. 276, 282 (1918); *see also Iowa Cent. Ry. Co. v. Bacon*, 236 U.S. 305, 308 (1915) (holding that plaintiff could defeat removal by requesting only $1,990 in damages (at a time when

the jurisdictional threshold was $2,000), even though plaintiff's loss was $10,000).

Standard Fire questions (at 23 n.7) whether this principle extends to class actions. But this Court is familiar with the principle in the context of class actions. For example, *United States v. Hohri*, 482 U.S. 64 (1987), involved a putative class-action suit by 19 individuals (former internees or their representatives) against the United States. The named plaintiffs limited requested damages to $10,000 per claim in order to qualify for federal district court jurisdiction and avoid the claims court. *Id.* at 66 & n.1. This Court did not suggest any infirmity with that jurisdictional strategy. Similarly, in such cases as *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2548 (2011), and *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 622-23 & n.18 (1997), the Court has examined the class claims as framed by the named representatives without suggesting that it is the court's role to second-guess at the jurisdictional stage the litigation strategies of the named class representative.[4] Standard Fire's argument that a represen-

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[4] Numerous lower federal courts, both before and after CAFA, have recognized the named plaintiff as the master of the complaint for jurisdictional purposes. *See, e.g., Garbie v. DaimlerChrysler Corp.*, 211 F.3d 407, 410 (7th Cir. 2000) (stating in a class-action case that "plaintiffs as masters of the complaint may include (or omit) claims or parties in order to determine the forum") (citing *Caterpillar*, 482 U.S. at 392); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 449 (7th Cir. 2005) (stating in a CAFA case that, "as master of the case, the plaintiff may limit his claims (either substantive or financial) to keep the amount in controversy below the threshold"); *Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 401, 407 (6th Cir. 2007); *Johnson v. Advance Am.*, 549 F.3d 932, 937 (4th Cir. 2008); *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 953 (9th Cir. 2009).

tative plaintiff "cannot be the master" of class claims prior to class certification (Pet. Br. 23 n.7) rests on the mistaken premise – refuted in Part II below – that a court, merely by considering an amount-in-controversy stipulation at the jurisdictional stage, somehow resolves absent class members' claims on the merits.

The longstanding nature of the "master of the complaint" principle undermines any suggestion that CAFA meant to displace it *sub silentio*. *See Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-67 (1979). Moreover, here, Congress was not merely *silent*; rather, CAFA took its amount-in-controversy test from the traditional diversity statute, 28 U.S.C. § 1332(a). CAFA made a series of detailed modifications to the statutory scheme governing diversity jurisdiction, altering certain established rules but not others. Nothing in CAFA eliminates the representative plaintiff's role as master of the complaint or prevents a class plaintiff from "suing for less than the jurisdictional amount." *St. Paul Mercury*, 303 U.S. at 294. Indeed, the CAFA Report repeatedly cited *St. Paul Mercury*. *See* S. Rep. at 43 n.128, 70-71.

(b) Jurisdiction is determined on the basis of the plaintiff's pleadings at the time of removal

As Standard Fire concedes, CAFA incorporates the familiar diversity principle that "'the status of the case as disclosed by the plaintiff's complaint is controlling in the case of a removal.'" Pet. Br. 11-12 (quoting *St. Paul Mercury*, 303 U.S. at 291); *see also Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 390 (1998) ("[F]or purposes of removal jurisdic-

tion, we are to look at the case as of the time it was filed in state court – prior to the time the defendants filed their answer in federal court.").

Accordingly, at the jurisdictional stage, it is not relevant to the amount-in-controversy question whether the pleadings might be amended in the future or whether the stipulation might later be rejected, and class certification denied, by a hypothetical future ruling at the class-certification stage. Federal jurisdiction cannot be based on contingent future events. *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003).

Therefore, if and when the named plaintiff moves to certify a class, absent class members (and the defendant) are free to argue that the manner in which the plaintiff has framed the claims is unreasonable, that the stipulation is a factor to consider in whether the plaintiff is an adequate class representative or the claims are typical of other class members, and that the stipulation violates the due process rights of absent class members. That is precisely the system practiced by trial courts today, which are able to consider the reasonableness of a stipulation as part of any objections to the plaintiff's adequacy of representation at the class-certification stage.[5]

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[5] *See Eufaula Drugs, Inc. v. ScripSolutions*, No. 2:05CV370-A, 2005 WL 2465746, at *6 (M.D. Ala. Oct. 6, 2005) ("While it may be that, by limiting the class recovery, [plaintiff] has raised issues as to its fitness to act as a class representative, those are questions to be resolved in the class certification stage and do not determine jurisdictional issues."); *Holcombe v. SmithKline Beecham Corp.*, 272 F. Supp. 2d 792, 797 (E.D. Wis. 2003) ("[C]oncern about a limitation on the value of claims may be addressed when the question of plaintiff's adequacy as a representative is considered."); *Kline v. Avis Rent A Car Sys., Inc.*, 66

(c) Doubts are resolved against removal

Any doubts about the meaning of CAFA should be resolved against federal jurisdiction under the long-standing principle that jurisdictional statutes are narrowly construed. *See Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 810 (1986). This Court has adopted a policy of "strict construction" of removal statutes because of "'[d]ue regard for the rightful independence of state governments.'" *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941) (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)). Hence, "statutory procedures for removal are to be strictly construed." *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002) (citing *Shamrock Oil* and *Healy*); *see also Holmes Group*, 535 U.S. at 832 ("our cases addressing removal require" "'[d]ue regard for the rightful independence of state governments'") (quoting *Shamrock Oil* and *Healy*); *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212 (1971) ("[W]e should proceed with caution in construing constitutional and statutory provisions dealing with the jurisdiction of the federal courts.").

Those interpretive canons flow from the bedrock principle that "[f]ederal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed

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F. Supp. 2d 1237, 1240 (S.D. Ala. 1999) (concern "applies solely to the issue of whether the class should be certified, and that issue does not arise until after the court determines it has subject matter jurisdiction"); *see also Quebe v. Ford Motor Co.*, 908 F. Supp. 446, 453 (W.D. Tex. 1995); *Four Way Plant Farm, Inc. v. National Council on Compensation Ins.*, 894 F. Supp. 1538, 1544 (M.D. Ala. 1995); *Hall v. ITT Fin. Servs.*, 891 F. Supp. 580, 582 (M.D. Ala. 1994).

that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted).

CAFA did not change that fundamental and longstanding rule. In *Hertz Corp. v. Friend*, 130 S. Ct. 1181 (2010), this Court reaffirmed in the CAFA context that "[t]he burden of persuasion for establishing diversity jurisdiction . . . remains on the party asserting it." *Id.* at 1194 (citing *Kokkonen*, 511 U.S. at 377; *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)).[6]

B. Standard Fire's Approach Would Destroy The Administrability Of The System Congress Intended In CAFA

Standard Fire's construction would violate the purposes of CAFA by creating an unworkable system that would vastly complicate jurisdictional inquiries. As this Court recognized in *Hertz*, which was a CAFA case, "administrative simplicity is a major virtue in a

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[6] *Amicus* Partnership for America urges (at 19) this Court to reject this settled principle in reliance on the "mandatory" view of federal jurisdiction expressed by Justice Story in dictum in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 328 (1816). It is too late in the day for such a radical change, which was rejected even by the First Congress. "Beginning with the Judiciary Act of 1789, Congress has never vested the federal courts with the entire 'judicial Power' that would be permitted by Article III." RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 276 (6th ed. 2009); *see also* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 275 (3d ed. 2000) ("[t]he Supreme Court has never endorsed Justice Story's argument").

jurisdictional statute." 130 S. Ct. at 1193. The Court explained:

> Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims. Complex tests produce appeals and reversals, encourage gamesmanship, and, again, diminish the likelihood that results and settlements will reflect a claim's legal and factual merits. Judicial resources too are at stake. Courts have an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it. So courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case.
>
> Simple jurisdictional rules also promote greater predictability. Predictability is valuable to corporations making business and investment decisions. Predictability also benefits plaintiffs deciding whether to file suit in a state or federal court.

Id. (citations omitted). Accordingly, the Court "place[d] primary weight upon the need for judicial administration of a jurisdictional statute to remain as simple as possible." *Id.* at 1185-86; *see also id.* at 1194 (citing the benefit of "a clearer rule" and the need "to avoid overly complex jurisdictional administration"). This Court has frequently stressed the importance of keeping jurisdictional inquiries simple

and judicially administrable, rather than front-loading fact-intensive, merits-related issues.[7]

Standard Fire's approach contravenes that principle. If courts cannot rely on pleadings, stipulations, and other devices to resolve disputes about the amount in controversy, they will be forced to consider a host of merits questions, such as damages calculations, at the very outset of a case, prior to discovery or the development of any evidence. In many cases, assessing the amount in controversy could mean reviewing full-blown damages models and hearing testimony from dueling expert witnesses, a needlessly expensive and time-consuming endeavor for cases allegedly involving less than $5 million for the entire state-wide class. Such a system would run directly counter to the CAFA Report's promise that CAFA

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[7] *See, e.g.*, *Sisson v. Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring in the judgment) (A jurisdictional boundary "'should . . . , if possible, be a bright line, so that very little thought is required to enable judges to keep inside it. If, on the contrary, that boundary is vague and obscure, raising "questions of penumbra, of shadowy marches," two bad consequences will ensue similar to those on the traffic artery. Sometimes judges will be misled into trying lengthy cases and laboriously reaching decisions which do not bind anybody. At other times, judges will be so fearful of exceeding the uncertain limits of their powers that they will cautiously throw out disputes which they really have capacity to settle, and thus justice which badly needs to be done will be completely denied. Furthermore, an enormous amount of expensive legal ability will be used up on jurisdictional issues when it could be much better spent upon elucidating the merits of cases. In short, a trial judge ought to be able to tell easily and fast what belongs in his court and what has no business there.'") (quoting ZECHARIAH CHAFEE, THE THOMAS M. COOLEY LECTURES, SOME PROBLEMS OF EQUITY 312 (1950) (in turn quoting *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 426 (1916) (Holmes, J., concurring))) (alteration in original).

"will simplify – not complicate – a court's jurisdictional inquiries." S. Rep. at 68; *see also Holmes Group*, 535 U.S. at 831-32 (rejecting jurisdictional interpretation that would "contravene the longstanding policies underlying our precedents," including that "the plaintiff is 'the master of the complaint,'" that would "radically expand the class of removable cases," and that would "undermine the clarity and ease of administration of the well-pleaded-complaint doctrine").

Standard Fire complains that Arkansas courts currently permit plaintiffs "to pursue expensive, far-ranging, and burdensome discovery" prior to briefing on class certification, Pet. Br. 14, but the evidence does not support that assertion, *see infra* Part III.C. In any event, if the problem were real, Standard Fire's approach would make the situation *worse*, as this case illustrates. In the district court below, respondent did not introduce his own amount-in-controversy calculations (Pet. Br. 7), but only because respondent's pleading and stipulation provided a clear guarantee that the $5,000,000 threshold could not be met. If this Court adopts Standard Fire's approach, however, plaintiffs will be forced to present competing jurisdictional calculations, and both plaintiffs and defendants will need to develop increasingly elaborate and detailed evidence regarding the amount in controversy. No longer will cases be able to proceed on the basis of an abbreviated and conclusory declaration of the kind that Standard Fire submitted here. *See* JA9a-11a. Rather, the defendant will be appropriately required to justify the data assumed in the declaration, to produce the documents relevant to its jurisdictional calculation, and to produce its declarant for deposition, so that the plaintiff has an

opportunity to respond to the defendant's calculation and present one of her own. Jurisdictional discovery could well consume months of activity and millions of dollars in fees and expenses, for both parties.

Moreover, attorneys' fees made up roughly one-third of Standard Fire's proposed amount in controversy, and those fees required an assessment of eight factors, such as the skill of counsel and the results obtained. *See infra* Part IV. Typically, the award of such fees is made at the very conclusion of a proceeding, by a trial judge who has grown familiar with the case and the efforts of counsel over time. Under Standard Fire's approach, a projected fee award will need to be made before the case has hardly started, in an exercise of pure guesswork.

There is no logical stopping point to Standard Fire's approach. The decision to stipulate to damages of a certain size is no different from innumerable other decisions that class representatives inevitably make as masters of their complaints. Named plaintiffs bringing putative class actions necessarily "limit" the recovery of the proposed class by, for example, picking and choosing which defendants to sue and which causes of action and elements of damages to include. According to Standard Fire, none of these decisions is "bind[ing]" on absent class members at the jurisdictional stage. Pet. Br. 10 ("[B]efore a class is certified, nothing Plaintiff says or does can diminish the rights of absent individuals."); *id.* at 32.

Under Standard Fire's test, a court would be required to reexamine every strategic and tactical decision by a named plaintiff in assessing the value of absent class members' claims – potential claims

that the named plaintiff did not assert, possible defendants the named plaintiff did not pursue, and so on. In this very case, Standard Fire challenges respondent's decision in his pleading to limit the class period to two years rather than five. *Id.* at 6 n.1. The reasonableness of that decision was not raised in Standard Fire's petition for a writ of certiorari and is not fairly included in the Question Presented. Nor does Standard Fire point to anything in the record to impeach the district court's finding that the decision to limit the class period was not made in bad faith. Pet. App. 14. But the very fact that Standard Fire seeks to second-guess at the removal jurisdiction stage respondent's decision with respect to the *class period* demonstrates the utter impracticality of Standard Fire's approach, which would place district courts in the untenable position of revisiting key strategic decisions made by a plaintiff simply to determine whether federal-court jurisdiction exists.

If a putative class representative's decisions in framing the complaint could be disregarded, a federal court could always speculate (for example) that an entirely hypothetical new class representative *might* assert a federal claim for the class (establishing federal-question jurisdiction) or *might* expand the class to meet the CAFA jurisdictional minimum. The result would be to enable defendants to remove to federal court virtually any class action filed in state court, forcing federal district courts to engage in complex factual inquires in addressing motions to remand. The litigation that would ensue over those actions is precisely the *opposite* of the clear jurisdictional rules this Court has generally favored. *See Hertz*, 130 S. Ct. at 1193.

C. CAFA's History Confirms That Congress Did Not Intend To Foreclose Class Representatives' Factual Stipulations As To The Amount In Controversy

Remarkably, although Standard Fire and its *amici* cite the legislative history of CAFA some 80 times in their multifarious briefs, they fail to present the Court with the most relevant portions of that history. In fact, the CAFA Report expressly approved of the courts' consideration of jurisdictional stipulations – *the very practice at issue here.* The Report observed that a putative class representative could enter into a *factual stipulation* on which a court could rely to make a jurisdictional determination: "[T]he Committee cautions that these jurisdictional determinations should be made largely on the basis of readily available information. . . . Less burdensome means (e.g., *factual stipulations*) should be used in creating a record upon which the jurisdictional determinations can be made." S. Rep. at 44 (emphasis added).[8]

The CAFA Report acknowledged the ability of putative class representatives to structure their complaints to avoid federal jurisdiction: "class counsel can limit the potential for removal as the case proceeds by defining the class to encompass only parties that were injured as of the date on which the

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[8] The CAFA Report's reference to "factual stipulations" refutes Standard Fire's argument regardless of whether the Committee intended to refer to unilateral stipulations by the plaintiff or to joint stipulations between both parties. In either case, Standard Fire would contend that a putative class representative, "before certification of a class," "has no authority" "to bind the putative class" and that any such stipulation is therefore "a nullity for jurisdictional purposes." Pet. Br. 3. The Report, however, rejects that position.

action was filed or only parties who are citizens of a certain state." *Id.* at 72. The Report recognized a named plaintiff's control over amount-in-controversy allegations: "if a plaintiff, through amendment or otherwise, increased the amount in controversy . . . a complaint filed in state court – and previously not subject to federal jurisdiction – could properly be removed." *Id.* at 71.

The Report explained that "questions arise in current practice on jurisdictional issues. Well-established law exists to resolve these questions, and [CAFA] does not change – or even complicate – the answers to these questions. In short, the 'rules of the road' on such issues are already established, and [CAFA] does not change them." *Id.* at 70.

D. Standard Fire's Construction Of CAFA Is Flawed

1. Standard Fire's textual argument has no merit

Standard Fire ignores the fact that the governing standard of CAFA's amount-in-controversy test – whether "the matter in controversy exceeds the sum or value of $5,000,000," 28 U.S.C. § 1332(d)(2) – was taken directly from the traditional diversity statute governing non-class actions, 28 U.S.C. § 1332(a). Instead, Standard Fire focuses on the portion of § 1332(d)(6) providing that "the claims of the individual class members shall be aggregated" to determine whether they exceed $5,000,000. Standard Fire erroneously contends that the term "claims" somehow prevents a court from considering a stipulation in assessing the value of the class claims. Pet. Br. 3, 8-9, 19-25. Standard Fire is incorrect, for several reasons.

(a) Standard Fire's focus on § 1332(d)(6) is misplaced

Standard Fire places more weight on § 1332(d)(6) than its language can bear. The thrust of § 1332(d)(6) is to abrogate *Zahn*'s holding that the claims of individual members of a putative class cannot be aggregated to satisfy the amount-in-controversy requirement. Given the narrow interpretation presumptively given to removal statutes, *see supra* Part I.A.2(c), a clear statement would be needed before the word "claims" in § 1332(d)(6) could be construed as eliminating the longstanding rule of diversity jurisdiction – that the plaintiff can avoid removal by asking for less than the jurisdictional amount. That rule, which is incorporated in both subsections (d)(2) and (d)(6) via the "the matter in controversy" language, is not countermanded by any language in § 1332(d)(6), let alone by any clear statement.

Indeed, the elimination of *Zahn*'s anti-aggregation rule in subsection (d)(6) strongly supports respondent's interpretation of the statute. By making the class-wide total of damages the relevant amount-in-controversy test, subsection (d)(6) makes a stipulation regarding that total precisely what a court should consider. *See supra* Part I.A.1. Thus, the CAFA Report refers to "aggregating damages," S. Rep. at 43, and explains that "it will be much easier to determine whether the amount in controversy presented by a purported class as a whole (that is, in the aggregate) exceeds $5 million than it is to assess the value of the claim presented by each and every individual class member," *id.* at 70.

In fact, Standard Fire followed just such an approach in the calculations in its notice of removal in this case. *See* Pet. App. 41-47; JA9a-11a. Standard Fire did not address individual class members' hypothetical "right to recovery" under applicable law, although it now urges the Court to adopt such an approach. Pet. Br. 23-24 (emphasis omitted). In the district court, Standard Fire considered rough-and-ready aggregate data in calculating the probable value of the class-wide claim. *See* JA9a-11a. Standard Fire conducted a search of two databases to conclude that payments to Arkansas policyholders, on an aggregate basis, totaled $15,274,806. *See* JA10a-11a. Standard Fire then multiplied the total by 20% to reflect the allegation in respondent's Complaint (Pet. App. 57) and Prayer for Relief (*id.* at 72) that the typical GCOP payment is "20% of the estimated job." *Id.* at 43.

Ironically, Standard Fire's calculation of the amount in controversy in this case violates its own legal standard. Standard Fire premised its calculation on respondent's allegation that the typical GCOP payment is 20% of the job, even though, under Standard Fire's own theory, such an allegation could not be binding on absent class members, who would be free to propose different percentages. Nor did Standard Fire inquire whether any members of the class had lost their "legal entitlement to relief" (Pet. Br. 24) because they had already received compensation for GCOP as part of their insurance payments. Standard Fire's inconsistency implicitly demonstrates its own understanding of the relevance of a plaintiff's pleadings in calculating the amount in controversy.

(b) Standard Fire's interpretation of "claims" is flawed

Standard Fire unpersuasively attempts to draw a distinction between class members' hypothetical "right to recovery" and "the amount actually sought in recovery." Pet. Br. 23-24 (emphases omitted). A plaintiff's pleading (including any attached stipulation) affects *both* her "legal entitlement to relief" and "monetary demand." *Id.* at 24. Respondent in this case is not using a pleading or stipulation "to alter the aggregated total" of the claims. *Id.* at 9. Rather, the "claims" to be aggregated will be *defined* by the named plaintiff's complaint and pleading, including any attached stipulation. *See supra* note 4 (collecting authority demonstrating that the named plaintiff is the master of the class complaint for jurisdictional purposes).

Congress used the term "claims" in 28 U.S.C. § 1332(d)(6), not "potential claims." The absent class members' "claims" for jurisdictional purposes are exactly what the complaint says they are. If Congress had meant to make amount in controversy turn on the hypothetical "right to recovery" (Pet. Br. 9, 23 (emphasis omitted)), it would have said so. As Standard Fire ultimately concedes, the value of the class members' claims must be "determined by the class definition and allegations in Plaintiff's complaint at the time of removal." *Id.* at 11. For purposes of the amount-in-controversy inquiry, the "claims" of class members do not have some sort of transcendental existence, separate and apart from the actual pleadings.

Moreover, Standard Fire erroneously attempts to detach the stipulation and other features of the

complaint from the class members' "claims." The familiar rule, of course, is that stipulations and other exhibits attached to a complaint become part of the pleading for all purposes. *See, e.g., Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 608 n.3 (2003). Hence, the stipulation is a *constituent element* of the claims.

Standard Fire mis-cites (at 24-25) *United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723 (2011), in arguing that CAFA's use of the term "claims" excludes consideration of a plaintiff's requested monetary demand. On the contrary, *Tohono* stated that "'[c]ause of action' is the more technical term, while 'claim' is often used in a commonsense way to mean a right or *demand*." *Id.* at 1728-29 (emphasis added). It noted that the term "claim" in the Little Tucker Act "refers only to requests for money." *Id.* at 1728 (citing *United States v. Jones*, 131 U.S. 1 (1889)). And it referred to *Keene Corp. v. United States*, 508 U.S. 200 (1993), as holding that whether there is "some overlap in *the relief requested*" is germane to determining when "two suits are for or in respect to the same claim." 131 S. Ct. at 1727 (emphasis added; internal quotation marks omitted).

Standard Fire also cites (at 21) 28 U.S.C. § 1446(c)(2), enacted as part of the Federal Courts Jurisdiction and Venue Clarification Act of 2011 ("JVCA"), Pub. L. No. 112-63, 125 Stat. 758, but the JVCA does not apply to removals under CAFA, *see* Hartford Br. 6 n.2, and the JVCA proves the opposite of what Standard Fire claims.[9]

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[9] New 28 U.S.C. § 1446(c)(2) provides an exception in ordinary diversity cases to the usual rule that "the sum demanded in good faith in the initial pleading shall be deemed to be the

(c) The complaint meets Standard Fire's interpretation

In any event, the complaint in this case satisfies even Standard Fire's interpretation of CAFA. The pertinent language in respondent's complaint provides, as part of the class members' claims, that the "right to recovery" (as used in Pet. Br. 23-24) is limited to $5,000,000 for all members of the class. The body of the complaint states that "the total aggregate damages of the Plaintiff and all Class Members" are less than $5,000,000. Pet. App. 60. The Prayer for Relief and attached Stipulation are limited to these amounts as well. *Id.* at 72-73, 75. In Standard Fire's parlance, the pleadings show that "the aggregated total of the *individual* class members' claims" (Pet. Br. 12) is less than $5,000,000.

2. Standard Fire misreads CAFA's legislative history

Standard Fire and its *amici* cite snippets of CAFA's legislative history but ignore the passages expressly approving of jurisdictional stipulations. Pet. Br. 27-28. The cited snippets do not support Standard Fire. For example, Standard Fire refers to a passage

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amount in controversy," and § 1446(c)(2) allows a defendant to assert an amount in controversy in the notice of removal where a plaintiff's initial pleading seeks non-monetary relief or a money judgment in instances where the state practice either does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded. The Committee Report states that the JVCA was enacted because "[j]udges believe the current rules force them to waste time determining jurisdictional issues at the expense of adjudicating underlying litigation." H.R. Rep. No. 112-10, at 1-2 (2011). Standard Fire's approach would frustrate this objective, whereas respondent's position fulfills the purposes that Congress sought to achieve in the JVCA.

in the CAFA Report referring to state courts allowing "'lawyers to "game" the procedural rules.'" *Id.* at 10 (quoting S. Rep. at 4). But Standard Fire improperly truncates the quotation from the Report, which actually refers to courts allowing "lawyers to 'game' the procedural rules and keep *nationwide or multi-state* class actions in state courts." S. Rep. at 4 (emphasis added). This case does not involve a nationwide or multi-state class action, nor does it involve a suit seeking astronomical damages whose very pendency creates settlement pressure on a defendant. The class here is not the kind that Congress believed belonged in federal court. Indeed, Standard Fire also overlooks the fact that CAFA originally included a $2,000,000 amount-in-controversy requirement, but Congress increased the threshold to $5,000,000 after the CBO reported that most class-action lawsuits would likely satisfy the $2,000,000 requirement. *See supra* p. 5. Standard Fire's interpretation would lead to the problem that amendment sought to avoid, enabling defendants to flood the federal courts with small-dollar, state-specific class actions.[10]

Contrary to petitioner's assertion, the stipulation here is not an example of a "pre-CAFA tactic[]." Pet. Br. 19. Rather, the CAFA Report makes clear that the problem with pre-CAFA stipulations was that, under *Zahn*, federal jurisdiction was lacking if no class member's damages exceeded $75,000, even if

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[10] Although precise data are not available, researchers at the Federal Judicial Center have estimated that approximately 5,000 class actions per year are filed in state courts. *See* Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. Pa. L. Rev. 1723, 1741-42 (2008).

the total amount at stake ran into the millions or even billions of dollars. *See* S. Rep. at 11 ("This leads to the nonsensical result under which a citizen can bring a 'federal case' by claiming $75,001 in damages for a simple slip-and-fall case against a party from another state, while a class action involving 25 million people living in all fifty states and alleging claims against a manufacturer that are collectively worth $15 billion must usually be heard in state court (because each individual class member's claim is for less than $75,000).").

Congress addressed that issue by creating a $5,000,000 jurisdictional amount in controversy, not by prohibiting the consideration of stipulations in the jurisdictional inquiry. If Congress had wanted to provide that a class-action complaint seeking $4,999,999 in damages satisfied federal jurisdictional requirements, it could have said so. A plaintiff does not "game" the system by suing for less than the specified jurisdictional threshold, any more than a driver "cheats" the traffic laws by driving 1 MPH under the speed limit. The nature of a bright-line jurisdictional threshold is that a complaint under the requisite amount does not trigger jurisdiction, whether the difference is $1 or $1,000,000.

II. A COURT'S CONSIDERATION OF A NAMED CLASS PLAINTIFF'S PLEADINGS AND ATTACHED STIPULATION DOES NOT OFFEND DUE PROCESS

A. Standard Fire Ignores The Nature Of Jurisdictional Facts

A court's determination of jurisdictional facts at the outset of a case does not resolve the merits of absent class members' claims. In *Jerome B. Grubart,*

Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527 (1995), for example, this Court rejected the argument that "the truth of jurisdictional allegations must always be determined with finality at the threshold of litigation." *Id.* at 537; *see also Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 285 (1993) (distinguishing between merits of claim and jurisdictional determination); *Bell v. Hood*, 327 U.S. 678, 682-83 (1946) (same).

Therefore, as with any jurisdictional inquiry, the amount-in-controversy determination is not a merits decision and does not adjudicate the merits of the claims of absent class members. Indeed, under the prior rule of *Zahn*, courts looked to the claims of unnamed class members in determining the jurisdictional amount, without causing any due process problems.[11] Standard Fire's own *amicus* admits that "the amount in controversy is merely an estimate at the beginning of the case." Hartford Br. 3.

Standard Fire insists, implausibly, that it seeks to vindicate the due process interests of absent class members. Citing *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011), Standard Fire contends that, prior to class certification, a named plaintiff "has no authority to diminish the rights" of absent class members. Pet. Br. 3. That argument misconstrues the nature of the amount-in-controversy determination at the jurisdictional stage. There is no potential "deprivation" of property (within the meaning of this Court's

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[11] In *Zahn* itself, the district court relied on *St. Paul Mercury*, 303 U.S. at 288-89, and looked to the "allegations" of "the named plaintiffs" in ascertaining whether absent class members could satisfy the amount in controversy. *Zahn v. International Paper Co.*, 53 F.R.D. 430, 431 (D. Vt. 1971), *aff'd*, 469 F.2d 1033 (2d Cir. 1972), *aff'd*, 414 U.S. 291 (1973).

procedural due process jurisprudence) until after class certification, when class counsel is authorized to make binding decisions that have an impact on absent class members. No due process violation can occur at the jurisdictional stage because there is no constitutionally cognizable "deprivation" of property or liberty. *See American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999) ("The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'").

B. Standard Fire Erroneously Asserts That Absent Class Members Must Be Regarded As "Nonparties" For All Purposes

Standard Fire insists that absent class members must be treated strictly as "nonparties" prior to certification. Pet. Br. 30. Both CAFA and this Court's precedents reject Standard Fire's absolutist view. The CAFA Report explained that "the critics allege that there is an absolute bar on considering unnamed class members to be 'parties' to a purported class action." S. Rep. at 72. "[The premise of this challenge – that unnamed class members cannot be deemed parties to an action – is flatly inconsistent with the fact that in a variety of contexts over the years, federal court[s] have treated unnamed class members as parties to class actions." *Id.*; *see also id.* at 72-73 (citing, as examples of other instances where courts have treated unnamed class members as "parties" for certain purposes, *Zahn*, *supra*; *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 550-51 (1974) (holding that a putative class action tolls the statute of limitations as to all unnamed class members, because "the claimed members of the class stood as parties to the suit until and

unless they received notice thereof and chose not to continue"); and *Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002) (unnamed class members are considered "parties" for purposes of mounting an appeal)).

The CAFA Report explained that CAFA treats "unnamed class members [as] 'parties' to the litigation for purposes of the 'minimal diversity' jurisdictional requirement." *Id.* at 73. The Report states that "such a congressional determination about who is a class action 'party' would be wholly consistent with long-standing practice. For years, Congress and the courts have made practical determinations about how various categories of parties should be treated in assessing compliance with diversity jurisdiction prerequisites and specifically about the circumstances in which unnamed class members should be treated as parties to a lawsuit. The enactment of the 'minimal diversity' provisions of [CAFA] would be merely another such practical determination . . . that for purposes of the 'minimal diversity' jurisdictional inquiry established by the legislation, unnamed class members (as well as any named class members) shall be considered 'parties.'" *Id.*

Smith v. Bayer Corp., on which Standard Fire relies, is inapposite. It did not involve a stipulation or subject-matter jurisdiction under CAFA. Rather, *Smith* concerned a federal-court injunction ordering a West Virginia state court not to consider a motion for class certification filed by plaintiffs who had previously been absent class members in a Minnesota federal-court action that had denied class certification. This Court held that the injunction was improper under the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283. *Smith*

thus involved the ability of an absent class member to relitigate (in a *subsequent* action) a certification question previously resolved by a different court.

The instant case is different. This case involves a question of removal under CAFA, not a decision after the denial of certification to enjoin a subsequent state-court proceeding in light of the Anti-Injunction Act. The fact that no class-certification motion has been brought here is *just the point*: at this stage, the stipulation will have no impact on the merits of absent class members' claims. It will merely be considered for purposes of determining the amount in controversy for removal at this time. *See* Pet. App. 27.

III. STANDARD FIRE'S REMAINING ARGUMENTS LACK MERIT

A. Well-Settled Principles Of Law Would Prevent The "Abuses" Predicted By Standard Fire And Its *Amici*

Standard Fire and its *amici* raise the specter of potential abuses, but their arguments have no basis in reality. Standard Fire cannot cite a single case, in Arkansas or elsewhere, where a named plaintiff who had stipulated to less than $5,000,000 in class-wide damages was nonetheless subsequently: (i) awarded more than $5,000,000 by a court judgment, or (ii) permitted to amend the pleadings even to seek such a sum. The "abuses" and risks of which Standard Fire and its *amici* complain are entirely hypothetical and find no support in reality. In fact, settled legal principles would prevent any misconduct.

1. Stipulations protect defendants

The $5,000,000 threshold prevents class actions from having an "in terrorem" effect (Pet. Br. 15 (internal quotation marks omitted)) or operating as "judicial blackmail" (Mfrd. Housing Inst. Br. 6 (internal quotation marks omitted)). The amount at stake is limited. Standard Fire suggests that a plaintiff could amend a pleading or stipulation, post-removal, to seek additional damages in excess of the jurisdictional threshold. Pet. Br. 27-28. But CAFA eliminates the requirement that cases must be removed within one year of filing. *See* 28 U.S.C. § 1453(b). Accordingly, a defendant would have the opportunity to see a federal forum if the class action ever sought more than $5,000,000 in damages. Similarly, if a future court ever ruled that a stipulation was not binding on absent class members as a matter of due process, enabling a different class representative to pursue claims for different relief and different amounts in controversy, then a defendant would be free to invoke CAFA at that time.[12]

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[12] The district court also found that judicial estoppel under state law would prevent subsequent amendment, Pet. App. 11, as even Standard Fire ultimately concedes. Pet. Br. 32 n.8; *see also* 21st Century Br. 6 n.5; Hartford Br. 13. An Arkansas statute specifically makes a stipulation binding with respect to the amount in controversy. *See* Ark. Code Ann. § 16-63-221(b). Although the statute permits amendments subject to the Arkansas Rules of Civil Procedure, a court has the power to strike an amendment if it "determines that prejudice would result or the disposition of the cause would be unduly delayed because of the filing of an amendment." Ark. R. Civ. P. 15(a). In addition, the district court considered and rejected the suggestion that the stipulation's language would permit "accepting" (Defense Research Inst. Br. 5 ("DRI Br.")) more than $5,000,000 in damages. *See* Pet. App. 10-11.

Where a stipulation or other device is unenforceable as a matter of state law, it need not be considered in the amount-in-controversy calculation. *See* Hartford Br. 2, 4; DRI Br. 9. But the possibility of state-by-state variations in the enforceability of stipulations is not a troubling one. "The general rule, 'bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.'" *Howlett v. Rose*, 496 U.S. 356, 372-73 (1990) (citation omitted).

2. Plaintiffs cannot stipulate at "whim"

The Chamber of Commerce ominously but erroneously warns that a plaintiff might stipulate at 5 cents on the dollar or at "unreviewable whim." Chamber Br. 14. A plaintiff's role as master of the complaint is not unlimited. In *St. Paul Mercury*, the Court opined that a plaintiff's pleaded amount in controversy would control only if it were made "in good faith." 303 U.S. at 288. In addition, of course, Federal Rule of Civil Procedure 11 and similar provisions impose sanctions on parties and attorneys who make allegations with no reasonable basis.

Accordingly, courts already have ample authority to ignore (even for jurisdictional purposes) a stipulation or an aspect of a plaintiff's pleading that is made in bad faith or that reflects wildly implausible factual assumptions. Thus, the district court in the instant case inquired into whether plaintiff's allegations were made in "bad faith," but concluded that they were not. Pet. App. 14.

Given the facts of this case, that conclusion was plainly correct. Standard Fire itself calculated the amount in controversy as barely exceeding (by a mere $24,150) the $5,000,000 CAFA jurisdictional

threshold (*id.* at 8), using its own internal business data that were not available to respondent when he filed his complaint. Standard Fire's accusation that respondent's conduct is somehow evidence of "abuse[]" (Pet. Br. 12) rings completely hollow in light of the miniscule discrepancy between respondent's stipulation and Standard Fire's calculation. Moreover, Standard Fire itself calculated the expected damages for the class as just $3,054,961 – far below the CAFA jurisdictional threshold. Standard Fire was able to reach the requisite $5,000,000 threshold only by making a series of questionable assumptions, including that class counsel would receive a 40% attorneys' fee, that the fee would be computed on the basis of two years' worth of prejudgment interest, and that the court lacked the authority to order a lower amount in attorneys' fees to ensure that the total amount in controversy did not exceed $5 million. *See infra* Part IV.

B. Standard Fire Does Not Accurately Describe The Arkansas Class-Action System

This case requires this Court to adopt a nationwide interpretation of CAFA, but Standard Fire and its *amici* proceed as though this case is really a referendum on Arkansas and the Miller County courts. They caricature the Arkansas judiciary as a lawless system run amok and ask this Court to bend a federal statute to address this supposed local problem.

Their plea is misplaced and the caricature insulting. This Court has recognized that a state judiciary is free to operate according to its own rules of civil procedure, even where a state has adopted a verbatim version of federal Rule 23. *See Smith*, 131 S. Ct. at 2377 ("Federal and state courts, after

all, can and do apply identically worded procedural provisions in widely varying ways."). Of course, no state may depart from due process requirements, but there cannot be any serious suggestion of such an issue here. "A State's interest in regulating the work load of its courts . . . certainly suffices to give it legislative jurisdiction to control the remedies available in its courts." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730 (1988).

Standard Fire distorts Arkansas precedent when it asserts that the Arkansas Supreme Court "'does not require a rigorous analysis'" of class certification. Pet. Br. 16 (quoting *Farmers Union Mut. Ins. Co. v. Robertson*, 2010 Ark. 241, at 10, 370 S.W.3d 179, 186 (Ark. 2010)). Arkansas law "allows class actions to be certified first when there are predominating threshold issues of liability common to the class, even though there may be individualized issues that come later requiring either the creation of subclasses or decertification altogether." *Farmers Union*, 2010 Ark. 241, at 17, 370 S.W.3d at 189. The Arkansas Supreme Court has explained that a "'certify now, decertify later' approach to class-action litigation" is "fair to both sides." *Id.* at 15-16, 17, 370 S.W.3d at 188-89 (internal quotation marks omitted). "[E]ven if the trial court eventually decides that individual claims have to splinter in bifurcated proceedings, resolution of the issue of wrongful conduct common to all class members can achieve real efficiency as a starting point. We also note that there is a real benefit to the [defendants] in a class action in that they have the opportunity to nip multiple claims in the bud with common defenses." *Id.* at 17, 370 S.W.3d at 189 (internal quotation marks omitted). In the second phase of the bifurcated approach, defen-

dants may present whatever individualized defenses they choose. *See, e.g., SEECO, Inc. v. Hales*, 954 S.W.2d 234, 241 (Ark. 1997) (defendants may "present individual defenses subsequently").

The Arkansas approach is not a blank check for class action, and the state courts deny certification where no common, overarching issues exist to ensure class cohesion and predominance. In *Union Pacific Railroad v. Vickers*, 209 Ark. 259, at 15-21, 308 S.W.3d 573, 581-83 (Ark. 2009), and *Arthur v. Zearley*, 895 S.W.2d 928, 936 (Ark. 1995), for example, the state supreme court reversed trial-court certification orders on the ground that individualized questions prevented the satisfaction of the predominance requirement. *See also Faigin v. Diamante*, 2012 Ark. 8, 2012 WL 89978 (Ark. Jan. 12, 2012) (affirming denial of class certification); *Simpson Hous. Solutions, LLC v. Hernandez*, 2009 Ark. 480, 347 S.W.3d 1 (Ark. 2009) (affirming order that held one subclass appropriate for class certification but denied certification of another subclass); *Baptist Health v. Haynes*, 240 S.W.3d 576, 582-83 (Ark. 2006) (reversing trial court order that failed to analyze certification issues adequately); *Mittry v. Bancorpsouth Bank*, 200 S.W.3d 869, 871 (Ark. 2005) (affirming the denial of class certification for failure to meet predominance and other factors); *Williamson v. Sanofi Winthrop Pharm., Inc.*, 60 S.W.3d 428, 434-35 (Ark. 2001) (same); *Baker v. Wyeth-Ayerst Labs. Div.*, 992 S.W.2d 797, 800-02 (Ark. 1999) (affirming denial of certification for failure to meet predominance factor).

The Arkansas courts also enforce adequacy-of-representation requirements. *See, e.g., Advance Am. Servicing of Arkansas, Inc. v. McGinnis*, 2009 Ark. 151, at 5-6, 300 S.W.3d 487, 491 (Ark. 2009)

(summarizing factors governing adequacy standard); *Farm Bureau Policy Holders & Members v. Farm Bureau Mut. Ins. Co. of Arkansas, Inc.*, 984 S.W.2d 6, 15 (Ark. 1998) (finding that class representative could not adequately represent certain members of the class).

The Arkansas Supreme Court has instructed that trial courts must set forth their findings regarding adequacy of representation in order to permit meaningful review. *See BNL Equity Corp. v. Pearson*, 10 S.W.3d 838, 844-45 (Ark. 2000). "When reviewing a class-certification order, [the state court] focus[es] on the evidence contained in the record to determine whether it supports the circuit court's conclusion regarding certification." *Asbury Auto. Group, Inc. v. Palasack*, 237 S.W.3d 462, 465 (Ark. 2006).

Standard Fire cites (at 16) *DIRECTV, Inc. v. Murray*, 2012 Ark. 366, 2012 WL 4712206 (Ark. Oct. 4, 2012), but it misquotes the opinion. In fact, *DIRECTV* expressly acknowledged that individual issues may defeat predominance in the absence of sufficient common questions. *Id.* at 16, 2012 WL 4712206, at *9 (citing *Union Pacific Railroad v. Vickers* and *Arthur v. Zearley*, "two cases in which [the Arkansas Supreme Court] held that the predominance requirement had not been satisfied due to individual issues"). Standard Fire also cites (at 16) *General Motors Corp. v. Bryant*, 285 S.W.3d 634 (Ark. 2008), where the Arkansas Supreme Court upheld, under an abuse-of-discretion standard, a trial court's certification order that factual variations among class members' claims did not preclude a finding of predominance. The trial court found that "individual determinations relating to right to recovery or damages . . . pale in comparison to the

common issues surrounding GM's alleged defectively designed parking brake and cover up." *Id.* at 642. Standard Fire and its *amici* may disagree with that finding, but such disagreement is hardly a basis for construing CAFA or for insinuating that the Arkansas judiciary operates in a lawless fashion.

C. Standard Fire Misstates Class-Action And Discovery Practice In Miller County

Standard Fire and its *amici* assert that CAFA-evading stipulations are rampant in Arkansas state courts, particularly in Miller County, and they complain of burdensome discovery orders. However, they cannot point to anything in CAFA or its history that would make state-court *discovery orders* a proper factor in construing the amount-in-controversy provision.

Nor does the evidence bear out the accusations. For example, Standard Fire and its *amici* repeatedly cite Nan S. Ellis, *The Class Action Fairness Act of 2005: The Story Behind the Statute*, 35 J. LEGIS. 76, 93 n.115 (2009), for the proposition that Miller County is a "judicial hellhole[]." Yet the very footnote they cite in fact disproves their allegation:

- "The hellhole label persists in spite of the fact that empirical research tends to debunk the industry complaints." *Id.* (internal quotation marks omitted).
- "[T]he use of the term is 'catchy' and . . . the point of the hellhole campaign is not to create[] an accurate snapshot of reality. The point of the hellhole campaign is to motivate legislators and judges to make law that will favor repeat corporate defendants." *Id.* (internal quotation marks omitted).

- "[B]y sheer repetition these claims have gained some credibility . . . . [I]f you repeat something often enough, people will come to treat it as general knowledge." *Id.* (internal quotation marks omitted).

One *amicus* calculates 26 class-action settlements in Miller County since 2004. *See* Ctr. for Class Action Fairness Br. 9-10 ("CCAF Br."). In fact, the clerk's office of the Miller County Circuit Court has reported that only a total of 28 class actions have been *filed* in that court since 2000, or fewer than 2.5 per year. *See* Addendum B. In the end, Standard Fire and its *amici* admit that "it is difficult to get reliable data on class action settlements in state court." CCAF Br. 11. Settlements are confidential and "remain under seal." Pet. Br. 15.

Standard Fire's claim of burdensome discovery ignores the remedies available under Arkansas law. Arkansas Rule of Civil Procedure 26(c) specifically allows a party to move for a protective order on the ground of "undue burden or expense." Parties reluctant to move to quash discovery for fear of jeopardizing personal jurisdiction defenses can simply refuse to comply with discovery requests that they believe to be unreasonable and force plaintiffs to file a motion to compel under Rule 37. In response to that motion, the defendants can detail their objections.

Although Standard Fire's *amici* complain about the lack of interlocutory review of Arkansas discovery orders, *see* Mfrd. Housing Inst. Br. 11; 21st Century Br. 4, the materials they cite reveal that the Arkansas Supreme Court does intervene in discovery

disputes.[13] *See also Cooper Tire & Rubber Co. v. Phillips County Circuit Court*, 2011 Ark. 183, at 10, 2011 WL 1587755, at *6 (Ark. Apr. 28, 2011) (granting writ of certiorari in discovery dispute and opining that "[t]he circuit court grossly abused its discretion in this instance"). Further, interlocutory review of discovery orders is typically unavailable in federal court. *See Cheney v. United States Dist. Court for Dist. of Columbia*, 542 U.S. 367, 381 (2004).

An Arkansas cost-bond statute is available to protect a defendant's out-of-pocket costs stemming from discovery.[14] The very Arkansas scheduling orders cited by Standard Fire's *amici* show that hearing dates for motions to dismiss based on lack of personal jurisdiction, insufficiency of process, insufficiency of service of process, improper venue, and forum non conveniens, are set well in advance (by six months) of hearings on class certification. *See* 21st Century Br. App. 6a-9a.

Even on its own terms, Standard Fire's story is full of holes. The "crushingly expensive" (Mfrd. Housing Inst. Br. 16) and "mountainous discovery" (21st Century Br. 8) of which Standard Fire's *amici* complain turns out to be discovery requests on the order of "131 interrogatories, 189 requests for production of documents," and a request for a physical inspection of defendants' data systems. *Id.* at 18. Another case involved "185 interrogatories, 385 document requests,

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[13] *See* Michelle Massey, *Sanctioned Insurance Company Petitions Arkansas Supreme Court*, Southeast Texas Record, Dec. 29, 2009 (*cited in* Mfrd. Housing Inst. Br. 16).

[14] *See* Michelle Massey, *Farmers Seeks Bond To Cover Discovery Costs in Arkansas Class Action*, Southeast Texas Record, Feb. 25, 2010 (*cited in* Mfrd. Housing Inst. Br. 13).

and 86 requests for admission." Chamber Br. 23. A third concerned discovery expenses of "$1.45 million." *Id.* at 24 n.10. Quite simply, it is not plausible for Standard Fire's *amici* – who have spared little expense in filing more than a dozen *amici* briefs before this Court in this case – to claim that they have been coerced by such requests into settlements of "$100 million" or more. *Id.* at 21.

Standard Fire and its *amici* repeatedly cite one proceeding that they claim involved a defendant potentially facing $45,000,000 in discovery costs. *See* Michelle Massey, *'Failure To Communicate' Could Lead to $45 M in Discovery Costs*, Southeast Texas Record, Aug. 8, 2007 (*cited in* Pet. Br. 14); Michelle Massey, *Class Counsel Attempts To Disqualify Defense Attorney in Foremost Insurance Case*, Southeast Texas Record, Mar. 13, 2008 (*cited in* Mfrd. Housing Inst. Br. 13, 14). Yet the cited news articles make clear that the "$45 million" figure was Foremost Insurance's own self-serving estimate, that Foremost had previously refused a streamlined approach proposed by the plaintiffs, and that it served the plaintiffs with discovery requests that they believed to be equally burdensome. The 2007 article also reveals that the Miller County Circuit Court urged the parties to resolve their discovery dispute and warned both of them that the court opposed practices "that would drag out the proceedings and drive up the cost of litigation." In the end, there is no indication that Foremost actually spent $45,000,000, or anything like it.

Other defendants ignore their own role in triggering discovery disputes. Farmers Insurance insisted on defending an action on a plaintiff-by-plaintiff basis, without use of statistical sampling, but then

complained of excess costs when the plaintiffs sought production of each claim file that would have formed a basis of Farmers' defense. *See* 21st Century Br. 21-23.

In short, Standard Fire's partisan criticisms of Miller County provide no basis to adopt its construction of CAFA.

D. The Court Should Not Consider Standard Fire's New Argument About The Burden Of Proof At The Jurisdictional Stage

Standard Fire argues that the district court erred in relying on the Eighth Circuit's legal framework that puts the burden initially on the removing defendant to prove the amount in controversy by a preponderance of the evidence and then (if that initial burden is met) allows a plaintiff to rebut the showing by using a stipulation to establish the absence of the requisite jurisdictional amount. Pet. Br. 35-36. This argument is waived, because Standard Fire proposed exactly such an approach to the district court below. *See* Pet. App. 41-42. Nor is the point fairly included within the Question Presented, which does not refer to the standard of proof or burden-shifting framework by which a court should analyze the amount in controversy. In any event, the Eighth Circuit's approach is the majority rule, as Standard Fire's own *amicus* concedes. *See* DRI Br. 10 n.3.

Standard Fire also contends that a stipulation cannot supply the requisite assurance to defeat removal jurisdiction. Pet. Br. 10-11, 36-38. This contention relies on Standard Fire's previous (defective) arguments. The short answer is that, at the time of removal (which is the relevant time for assessing the jurisdictional amount), a stipulation *does* provide

sufficient assurance to overcome a defendant's amount-in-controversy showing, and the hypothetical possibility of a subsequent change to the stipulation cannot be used to create federal jurisdiction. As Standard Fire's own *amicus* acknowledges, "[t]he form and content of purported recovery limitations can be decisive as to . . . whether it is legally impossible for the putative class to recover $5 million." Hartford Br. 14. Further, Standard Fire ignores the body of respondent's complaint, as well as the prayer for relief, which limited damages below the jurisdictional threshold regardless of the stipulation.

In addition, Standard Fire misstates the relative burdens of the parties. This Court has already opined in the CAFA context that "[t]he *burden of persuasion* for establishing diversity jurisdiction . . . remains on the party asserting it." *Hertz*, 130 S. Ct. at 1194 (emphasis added). The Court held that the removing party's burden will be satisfied only by "competent proof" of the jurisdictional facts in question. *Id.* at 1194-95. By using the term "burden of persuasion," this Court indicated that the removing defendant bears the burden throughout the proceeding, as eight circuits have held under CAFA. *See Amoche v. Guarantee Trust Life Ins. Co.*, 556 F.3d 41, 48 (1st Cir. 2009) ("[T]he burden of showing federal jurisdiction is on the defendant removing under CAFA. This is also the conclusion reached by the seven other circuits that have considered this issue.") (citing *Strawn v. AT&T Mobility LLC*, 530 F.3d 293, 298 (4th Cir. 2008) (compiling cases)) (internal citation omitted).

E. This Court Should Not Consider New Arguments By Petitioner's *Amici*

Petitioner's *amici* propose numerous arguments that Standard Fire does not advance, that were not raised below, and that are not fairly included within the Question Presented. "[T]his Court does not decide issues raised by *amici* that were not decided by the court of appeals or argued by the interested party." *Reno v. Koray*, 515 U.S. 50, 55 n.2 (1995) (citing cases); *see also Dickerson v. United States*, 530 U.S. 428, 444 n.8 (2000). Even so, the arguments have no merit.

Some *amici* complain that jurisdictional stipulations will lead absent class members to opt-out or mount collateral attacks to class-action settlements and deprive defendants of the benefits of res judicata. *See* 21st Century Br. 7-8; Wash. Legal Found. Br. 6, 13 ("WLF Br."); DRI Br. 19-31; Chamber Br. 25-28. Even if such secondary effects were a proper basis for interpreting CAFA, the supposed problem is a fiction. Any decision that a named plaintiff makes – what parties to sue, what claims to bring, and so on – could in theory lead an absent class member to opt-out and pursue his or her own claim. Far from disfavoring this process, Rule 23(b)(3) facilitates it. There is no more reason to disallow a jurisdictional stipulation on this basis than any other strategic choice by a named plaintiff. By definition, a stipulation can have no effect unless and until a court finds that it is not made in bad faith (at the jurisdictional stage) and that it does not render a named plaintiff an inadequate representative (at the class-certification stage). Court approval of settlements is also required for certified class actions in any state (such as Arkansas) that follows a version of federal

Rule 23. Tellingly, *amici*'s position here contradicts their earlier positions before this Court that collateral attacks are barred by res judicata.[15]

Amici Alabama *et al.* stress the need for state officers to have the opportunity to challenge the fairness of any proposed class-action settlements under CAFA. Alabama Br. 1, 21-28. But every state already has the ability to craft rules governing the approval of class-action settlements in its own courts, and indeed the Alabama brief stresses the legislative measures taken by many jurisdictions. *Id.* at 9-13. There is no need to distort the meaning of CAFA to provide federal jurisdiction simply to allow state attorneys general to appear in federal court, when those officers have the ability to appear in state courts.

Alabama also contends that multi-state class actions improperly allow one state court to impose its views extraterritorially. *Id.* at 14-21. The instant case involves a single-state action limited to a plaintiff class composed solely of Arkansas residents. Thus, the shoe is on the other foot: here, Alabama seeks to dictate to Arkansas the procedures it should use in its own courts. Moreover, Alabama's objection is not limited to the concept of a jurisdictional stipu-

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[15] *See* Br. for Petitioners at 18, *Dow Chem. Co. v. Stephenson*, 539 U.S. 111 (2003) (per curiam) (No. 02-271), 2002 WL 31914663 ("[B]arring respondents from relitigating adequacy of representation is fully consistent with the requirements of due process."); Br. for The American Ins. Ass'n, National Ass'n of Mfrs., and Chamber of Commerce of the United States, *Dow Chem. Co. v. Stephenson*, *supra* (No. 02-271), 2002 WL 31886866; Br. for Defense Research Inst., *Dow Chem. Co. v. Stephenson*, *supra* (No. 02-271), 2002 WL 31886878; Br. of Wash. Legal Found., *Dow Chem. Co. v. Stephenson*, *supra* (No. 02-271), 2002 WL 31886893.

lation. It seeks a more fundamental change in the law – a ban on multi-state class actions – that Congress did not adopt in CAFA.[16]

IV. AT MINIMUM, A STIPULATION IS ENFORCEABLE TO THE EXTENT IT LIMITS ATTORNEYS' FEES

Even if this Court were to accept Standard Fire's approach to determining the amount in controversy under CAFA, this Court should make clear that a stipulation is enforceable to the extent it limits attorneys' fees so that the amount in controversy remains below $5,000,000.

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[16] The National Association of Manufacturers ("NAM") contends that 28 U.S.C. § 1453 – a provision not cited in the notice of removal, *see* Pet. App. 36 (relying on 28 U.S.C. § 1441) – authorizes the removal of class actions without regard to amount in controversy, or even minimal diversity. However, § 1453 does not speak to subject-matter jurisdiction but instead prescribes procedures for removal, like the adjacent statutory provisions in Title 28, 28 U.S.C. §§ 1446-1452, 1454-1455. It does not independently confer subject-matter jurisdiction for removed class actions. Moreover, NAM's reading would be extraordinary; it would authorize the removal of actions that would exceed the federal court's authority under Article III to adjudicate. Not surprisingly, Standard Fire disagrees with NAM. *E.g.*, Pet. Br. 8 (referring to "the amount-in-controversy requirement as it relates to these class actions"). This Court, too, has recognized that CAFA's amount-in-controversy requirement applies to removal actions. *See Smith*, 131 S. Ct. at 2382 (CAFA "enable[s] defendants to remove to federal court any *sizable* class action involving minimal diversity of citizenship") (emphasis added). NAM's construction is disavowed by its own authority. *See* Adam N. Steinman, *Sausage-Making, Pigs' Ears, and Congressional Expansion of Federal Jurisdiction:* Exxon-Mobil v. Allapattah *and Its Lessons for the Class Action Fairness Act*, 81 WASH. L. REV. 279, 335 (2006) (concluding that "a class action must have some basis for removal elsewhere in federal law").

In this case, Standard Fire calculated the aggregated damages for the class as $3,054,961. *See* Pet. App. 8. Even when it added $366,595 (representing a 12% statutory penalty under state law for breach of an insurance contract), its calculated aggregate damages came to merely $3,421,556. *Id.* at 44. Standard Fire was able to generate $5,000,000 in amount in controversy only by adding a wholly speculative projected award of attorneys' fees amounting to 40% of an amount reflecting both the presumed recovery and two years' worth of prejudgment interest. *Id.* at 8, 45 n.4.[17]

To arrive at the 40% figure, Standard Fire relied on *Capital Life & Accident Insurance Co. v. Phelps*, 66 S.W.3d 678 (Ark. Ct. App. 2002). In that case, the Arkansas court of appeals did not independently calculate the reasonableness of a fee, but merely upheld the chancellor's award of 40% under an abuse-of-discretion test. The court of appeals noted eight factors to be assessed after completion of a case, including "the time and labor required to perform the service properly" and "the result obtained." *Id.* at 682. The court added that the factors were a "guide[]" but "there is no fixed formula in determining the reasonableness of an award of attorney fees." *Id.* at 682-83. The court of appeals concluded that, "[c]onsidering that this case has been tried twice and appealed three times, we see no abuse of discretion in the award in this case." *Id.* at 683.

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[17] Standard Fire based its projected award of attorneys' fees on a percentage of not only its estimated compensatory-damages amount but also two years' worth of prejudgment interest, even though CAFA provides that the amount in controversy is to be computed "exclusive of interest and costs." 28 U.S.C. § 1332(d)(2).

Here, the *Capital Life* factors could not be meaningfully assessed at the outset of this case, and there certainly was no basis for assuming that the case would be "tried twice and appealed three times." *Id.* Accordingly, the attorneys' fees component of Standard Fire's amount-in-controversy calculation was entirely speculative.

If the projected attorneys' fees are not stricken entirely from Standard Fire's computation as wholly conjectural, at a minimum this Court should rule that a stipulation should be considered in the jurisdictional inquiry to the extent it limits attorneys' fees rather than the recovery of absent class members. As Standard Fire's own *amici* note, "putative class counsel is restrained by legal and ethical obligations." WLF Br. 9. Enforcing a stipulation that has the effect of limiting attorneys' fees would be consistent with CAFA, as Standard Fire notes. *See* Pet. Br. 26 (citing concern over "large fees") (internal quotation marks omitted); Mfrd. Housing Inst. Br. 6 (attorneys' fees). Imposing such a rule would enable courts to hold parties to their stipulations without harming any class member and would vindicate Congress's intent for small-damages, state-law class actions to remain in state courts.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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November 28, 2012

ADDENDUM A

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. § 1332(a) and (d) provides:

28 U.S.C. § 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

* * * * *

(d)(1) In this subsection –

(A) the term "class" means all of the class members in a class action;

(B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought

by 1 or more representative persons as a class action;

(C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

(D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which –

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of –

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

(4) A district court shall decline to exercise jurisdiction under paragraph (2) –

(A)(i) over a class action in which –

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant –

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

(5) Paragraphs (2) through (4) shall not apply to any class action in which –

(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of

an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

(9) Paragraph (2) shall not apply to any class action that solely involves a claim –

(A) concerning a covered security as defined under 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

(10) For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

(11)(A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

(B)(i) As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which –

(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

(C)(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

(ii) This subparagraph will not apply –

(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

* * * * *

2. 28 U.S.C. § 1446(c)(2) provides:

28 U.S.C. § 1446. Procedure for removal of civil actions

* * * * *

(c) Requirements; Removal Based on Diversity of Citizenship. –

* * * * *

(2) If removal of a civil action is sought on the basis of the jurisdiction conferred by section 1332(a), the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy, except that –

(A) the notice of removal may assert the amount in controversy if the initial pleading seeks –

(i) nonmonetary relief; or

(ii) a money judgment, but the State practice either does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded; and

(B) removal of the action is proper on the basis of an amount in controversy asserted under subparagraph (A) if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in section 1332(a).

* * * * *

3. 28 U.S.C. § 1453 provides:

28 U.S.C. § 1453. Removal of class actions

(a) Definitions. – In this section, the terms "class", "class action", "class certification order", and "class member" shall have the meanings given such terms under section 1332(d)(1).

(b) In General. – A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(c)(1) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

(c) Review of Remand Orders. –

(1) In general. – Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not more than 10 days after entry of the order.

(2) Time period for judgment. – If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3).

(3) Extension of time period. – The court of appeals may grant an extension of the 60-day period described in paragraph (2) if –

(A) all parties to the proceeding agree to such extension, for any period of time; or

(B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days.

(4) Denial of appeal. – If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied.

(d) Exception. – This section shall not apply to any class action that solely involves –

(1) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(2) a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(3) a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

4. Section 2 of the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, codified at 28 U.S.C. § 1711 note, provides:

Sec. 2. FINDINGS AND PURPOSES.

(a) FINDINGS. – Congress finds the following:

(1) Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.

(2) Over the past decade, there have been abuses of the class action device that have –

(A) harmed class members with legitimate claims and defendants that have acted responsibly;

(B) adversely affected interstate commerce; and

(C) undermined public respect for our judicial system.

(3) Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where –

(A) counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value;

(B) unjustified awards are made to certain plaintiffs at the expense of other class members; and

(C) confusing notices are published that prevent class members from being able to fully understand and effectively exercise their rights.

(4) Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are –

(A) keeping cases of national importance out of Federal court;

(B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and

(C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.

(b) PURPOSES. – The purposes of this Act [see Short Title of 2005 Amendments note set out under section 1 of this title] are to –

(1) assure fair and prompt recoveries for class members with legitimate claims;

(2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and

(3) benefit society by encouraging innovation and lowering consumer prices.

ADDENDUM B

[Header Graphics Omitted]

Office of Clerk of the Circuit Court Miller County

Mary Pankey, Circuit Clerk

November 8, 2012

Mr. Johnny Goodson
406 Walnut Street
Texarkana, AR 71854

Dear Mr. Goodson:

I have researched the court records of Miller County to determine how many class action cases have been filed from 2000 thru the present. We located 28 class action cases filed during that period. Inasmuch as class action cases do not have a category of their own, we had to review several different categories to obtain this number. Therefore, this number is researched to the best of our knowledge.

Sincerely,

/s/ MARY PANKEY

Mary Pankey
Circuit Clerk

412 Laurel, Room 109 • Texarkana, AR 71854-5235
mpankey@cableone.net • Tel. 870-774-4501 • Fax 870-772-5293

REPLY BRIEF

No. 11-1450

IN THE

Supreme Court of the United States

THE STANDARD FIRE INSURANCE COMPANY,

Petitioner,

v.

GREG KNOWLES, individually and on behalf of all others similarly situated within the State of Arkansas,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

Plaintiff's brief disclaims both the foundation of the district court's remand order and his own prior arguments. The district court accepted the self-proclaimed "binding" nature of Plaintiff's stipulation, Pet. App. 74a–75a, holding that the stipulation "show[ed] to a legal certainty that the aggregate damages claimed on behalf of the putative class shall in good faith not exceed the state court's jurisdictional limitation of $5,000,000." *Id.* at 9a, 15a. Now, unable to get around this Court's decision in *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2379 (2011), Plaintiff repudiates the district court's reasoning and *agrees* with Standard Fire that his stipulation has no legally binding effect on the absent class members. In fact, Plaintiff admits that, "[b]y definition, [his] stipulation can have *no effect* unless and until a court finds . . . that it does not render [him] an inadequate representative (at the class certification stage)." Resp. Br. 53 (emphasis added); *see also id.* at 12.

Now that the parties agree that the stipulation has no effect on the absent class members' claims, the only possible conclusion is that the stipulation likewise has no effect on the amount in controversy—which is determined by "aggregat[ing]" "the claims of the individual class members." 28 U.S.C. § 1332(d)(6). Indeed, Plaintiff admits that, notwithstanding the stipulation, it remains possible that the putative class could recover more than $5,000,000, effectively conceding that it is *not* legally certain that the damages will be below CAFA's jurisdictional threshold. *See, e.g.*, Resp. Br. 13, 20.

Plaintiff nevertheless defends the district court's remand order by relying on the "master of the com-

plaint" doctrine. According to Plaintiff, this case should be returned to state court simply because he "'does not desire to try his case in the federal court.'" Resp. Br. 1 (quoting *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938)). But that doctrine does not apply here. CAFA expressly provides a specific mechanism for determining the amount in controversy—one that turns not on the named plaintiff's desire but on "the claims of the individual class members." 28 U.S.C. § 1332(d)(6). When the district court aggregated those claims as CAFA requires, it found, based on the uncontradicted evidence produced by Standard Fire, that the amount in controversy exceeds $5,000,000. Pet. App. 6a. That should have been the end of the jurisdictional inquiry.

Faced with the plain text of Section 1332(d)(6), Plaintiff attempts to find support in the CAFA Senate Report. Resp. Br. 28–29. That Report, however, overwhelmingly supports Standard Fire's position, and underscores that "section 1332(d) is intended to expand *substantially* federal court jurisdiction over class actions" and "should be read *broadly*, with a strong preference that interstate class actions should be heard in a federal court." S. Rep. No. 109-14, at 43 (2005) (emphases added).

This is exactly the type of "interstate class action[ ]" that Congress had in mind when it enacted CAFA—a suit by a putative class of thousands of Arkansas residents against an out-of-state defendant involving a potential aggregate damages award in excess of $5,000,000. If this case is returned to state court, Standard Fire will be vulnerable to the abusive practices of a jurisdiction that is well known for coercing large settlements that predominantly benefit class action plaintiffs' lawyers. *See generally* Br.

of 21st Century Cas. Co., et al. ("21st C. Br."); Br. of Manufactured Hous. Inst., et al. ("MHI Br.").

For all of these reasons, this Court should reverse the district court's remand order.

I. PLAINTIFF'S CONCESSION THAT HIS STIPULATION IS NOT BINDING IS FATAL.

Plaintiff disavows the core reasoning of the district court's remand order and, in so doing, effectively concedes that the amount in controversy exceeds CAFA's $5,000,000 jurisdictional threshold.

A. In direct conflict with the district court's reasoning, Plaintiff's complaint, his position below, and even his brief in opposition, Plaintiff now admits that his stipulation has "no effect" on the claims of the absent class members he seeks to, but does not yet, represent. Resp. Br. 3. As Plaintiff explains, his stipulation "cannot have a binding effect on the merits of absent class members' claims unless and until the class is certified." *Id.* at 12; *see also id.* at 53. *But see* Pet. App. 60a (Complaint ¶ 11) ("Plaintiff *and Class* stipulate that they will seek to recover total aggregate damages of less than five million dollars") (emphasis added).[1]

That concession requires reversal because it acknowledges that, at the time of removal, Plaintiff's stipulation had no effect on the "claims of the individual class members," which, when "aggregated" by the district court based on Standard Fire's unrebut-

---

[1] Plaintiff told the district court "[t]here can be no doubt that the stipulations in this case are binding," Br. in Support of Remand (D.E. 7) at 13, and told the Eighth Circuit there was "a sworn stipulation limiting the recovery of the alleged class," Ans. in Opp. to Pet. (8th Cir.) at 9.

ted evidence, exceeded CAFA's $5,000,000 jurisdictional threshold. 28 U.S.C. § 1332(d)(6).

Moreover, as Plaintiff further concedes, the determination regarding "[f]ederal jurisdiction cannot be based on contingent future events." Resp. Br. 20. But, by Plaintiff's own admission, the stipulation's effectiveness is contingent on several hypothetical future events that may never occur—the class must be certified, Plaintiff must be declared the class representative, and the stipulation must be deemed binding on the absent class members. *See id.* at 53 (conceding that the "stipulation can have *no effect* unless and until a court finds . . . that it does not render [Plaintiff] an inadequate representative (at the class-certification stage)") (emphasis added); *see also id.* at 13, 20; Br. of Public Citizen, Inc. 13. Plaintiff's own arguments thus confirm that, at the time of removal, the stipulation did not establish "to a legal certainty" that the amount in controversy was below $5,000,000. *St. Paul Mercury*, 303 U.S. at 289.[2]

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[2] Contrary to Plaintiff's assertion, Standard Fire is not challenging the "legal certainty" standard. Resp. Br. 51. Rather, Standard Fire merely contends that the test is unnecessary here because, under CAFA's plain language, the district court's calculation of the aggregated total of the "claims of the individual class members" is controlling for jurisdictional purposes. *See* Pet. Br. 36. In any event, Plaintiff's brief confirms what Standard Fire argued in its opening brief (at 35–38): If the Court applies the "legal certainty" test, the result is the same—the case belongs in federal court because, as explained above, Plaintiff has conceded that there are many ways in which the putative class could recover more than $5,000,000 in damages. *See* Resp. Br. 13, 20. Indeed, Plaintiff never even argues, let alone demonstrates, that he meets the "legal certainty" test.

B. Plaintiff asks this Court to treat the stipulation as a legal fiction that limits the amount in controversy for jurisdictional purposes only. *See* Resp. Br. 40 (the stipulation "will merely be considered for purposes of determining the amount in controversy for removal at this time"). But the true amount of damages potentially at stake controls, not merely the amount alleged in the complaint. This Court has expressly rejected "the idea that jurisdiction may be maintained by mere averment," instead requiring "competent proof" of "'the facts as they really exist.'" *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 184, 189 (1936) (quoting *Wetmore v. Rymer*, 169 U.S. 115, 120 (1898)); *see also Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1194–95 (2010) ("[A]llegations of jurisdictional facts . . . must [be] support[ed] . . . by competent proof.").

Even under 28 U.S.C. § 1332(a), where an individual plaintiff can avoid federal court by "suing for less than the jurisdictional amount . . . though he would be justly entitled to more," *St. Paul Mercury*, 303 U.S. at 294, he cannot avoid federal court simply by *saying* he is suing for less than the jurisdictional amount, while in fact there is nothing *actually* preventing him from recovering more. *See id.* at 289 (requiring a plaintiff seeking remand to establish that he "*cannot* recover" more than the threshold amount) (emphasis added).

Here, Plaintiff concedes that his stipulation does not foreclose the individual class members from recovering aggregate damages in excess of $5,000,000. The stipulation therefore did not reduce the amount

in controversy below CAFA's jurisdictional threshold.[3]

C. Plaintiff argues in the alternative that this Court should affirm the remand order because it is only attorney's fees that bring the amount in controversy over $5,000,000. *See* Resp. Br. 13, 57. But it is far too late for Plaintiff to raise that argument. Plaintiff did not dispute Standard Fire's attorney's fees calculation in the district court, the Eighth Circuit, or his brief in opposition, and has never argued (until now) that his stipulation could reduce the fee award independently of the other damages components. His argument is therefore waived. *See Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 86 (1988).

In any event, under Arkansas law, attorney's fees are a statutory component of each putative class member's potential recovery. *See* Ark. Code Ann. § 23-79-208(a)(1). Plaintiff therefore cannot limit the absent class members' ability to recover attorney's fees any more than he can limit any other component of their potential damages—at least not until the class is certified and Plaintiff is deemed an adequate representative. Thus, the district court's calculation—including attorney's fees—is dispositive and precludes remand.

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[3] Public Citizen argues that a class representative "could legitimately choose to waive" a portion of the class recovery in order to remain in state court, and that such a litigation strategy does not necessarily render him inadequate for class-certification purposes. Br. of Public Citizen, Inc. 5; *see also id.* at 11–12. That argument, however, misses the point. At the time of removal, Plaintiff had *not* yet been determined to be an adequate class representative. Thus, the enforceability of the stipulation remains contingent on a court's future determinations. *See St. Paul Mercury*, 303 U.S. at 289–90.

Indeed, recent experience in Miller County belies the notion that Plaintiff's stipulation could limit attorney's fees. Over the past few years alone, Plaintiff's class-action counsel have been awarded nearly half a *billion* dollars in attorney's fees. *See* MHI Br. 16–17, 10a–13a.

II. PLAINTIFF'S STIPULATION CANNOT REDUCE THE AMOUNT IN CONTROVERSY UNDER CAFA.

Having abandoned the district court's reasoning, Plaintiff instead defends the district court's remand order by invoking the principles of traditional federal diversity jurisdiction. But that argument is based on the faulty premise that the rules governing traditional federal diversity jurisdiction apply wholesale in the CAFA context, and ignores both CAFA's plain language and Congress's intent.

A. Under CAFA, Courts Must Aggregate The Claims Of The Individual Class Members.

1. Plaintiff contends that "[b]y borrowing the amount-in-controversy language directly from the diversity statute, CAFA incorporates the settled construction of that language to permit plaintiffs to establish the amount in controversy for jurisdictional purposes through pleadings and stipulations." Resp. Br. 15. That "settled construction," however, has never applied to class actions because, until CAFA, the claims of absent individuals were not relevant to the amount-in-controversy calculation. *See* 28 U.S.C. § 1367; *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 300–01 (1973).

In enacting CAFA, moreover, Congress did *not* merely "borrow" the language of the traditional di-

versity statute. There are substantial differences between CAFA jurisdiction and traditional diversity jurisdiction, all of which appear in the plain text of the U.S. Code. *See, e.g.*, 28 U.S.C. § 1332(d)(2)(A) (replacing the complete diversity requirement with a minimal diversity requirement); *id.* § 1453(b) (eliminating the one-year limitation on removal, allowing a defendant to remove an action brought in its home State, and eliminating the consent requirement for removal). Most importantly, Plaintiff ignores the plain language of 28 U.S.C. § 1332(d)(6), which expressly prescribes the method for calculating the amount in controversy in the class-action context: "[T]he claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000." Section 1332(a), in contrast, is silent about the method courts should use to calculate the amount in controversy in the traditional diversity setting.

Thus, Plaintiff is simply wrong when he asserts that CAFA "reflects Congress's intent to embrace . . . th[e] settled principles" of traditional diversity jurisdiction. Resp. Br. 16. To the contrary, the Senate Report explains that Congress enacted CAFA because "the [traditional] diversity and removal standards as applied in interstate class actions [were] facilitat[ing] a parade of abuses, and [we]re thwarting the underlying purpose of the constitutional requirement of diversity jurisdiction." S. Rep. No. 109-14, at 6. There was nothing "*sub silentio*," Resp. Br. 19, about Congress's decision to displace the traditional method of determining the amount in controversy—it was explicit and intentional. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 594 n.12 (2005) (Ginsburg, J., dissenting) ("CAFA's enlargement of federal-court diversity jurisdiction

was accomplished, 'clearly and conspicuously,' by amending § 1332.").

2. Plaintiff contends that "Standard Fire places more weight on § 1332(d)(6) than its language can bear." Resp. Br. 30. According to Plaintiff, Section 1332(d)(6) does nothing more than "displace in CAFA cases the rule of *Zahn* . . . , which prohibits courts from aggregating the claims of individual class members to satisfy the amount-in-controversy requirement of the general diversity statute." Resp. Br. 2; *see also id.* at 30. Thus, Plaintiff contends that Section 1332(d)(2)—not Section 1332(d)(6)—is "the governing standard of CAFA's amount-in-controversy test." *Id.* at 29.

But those two provisions speak for themselves, working *together* to create the "governing standard" for determining the amount in controversy under CAFA. Resp. Br. 29. Section 1332(d)(2) states that the "matter in controversy" must exceed $5,000,000 to give rise to federal jurisdiction. And Section 1332(d)(6) instructs courts how they "shall" calculate the "matter in controversy" in a class action.

Congress could have drafted Section 1332(d)(6) to do nothing more than declare that the rule against aggregation does not apply to CAFA. *Cf.* 28 U.S.C. § 1453(b) ("the 1-year limitation under section 1446(c)(1) shall not apply" to removal of class actions). Or it could have drafted that provision to define "matter in controversy" as the total classwide demand asserted by the named plaintiff in the complaint. Congress did neither, instead making the amount in controversy a function of the claims of the *individual class members*, who (at the outset of a putative class action) are beyond the named plaintiff's

control, as Plaintiff now concedes. *See* Resp. Br. 12, 53.

Plaintiff further misreads Section 1332(d)(6) when he asserts that the provision "shifts the amount-in-controversy focus from a person-by-person analysis of individual class members to a class-wide total," "mak[ing] a stipulation regarding that total precisely what a court should consider." Resp. Br. 16, 30. To the contrary, Section 1332(d)(6) directs courts to determine the amount in controversy by evaluating (and aggregating) the "claims of the *individual* class members." Section 1332(d)(6)'s focus on the individual class members is yet another reason why a pre-certification stipulation purporting to limit only the total *classwide* recovery has no bearing on the amount in controversy.

Plaintiff attempts to draw support for his reading of Section 1332(d)(6) from the Senate Report's reference to "'aggregating damages.'" Resp. Br. 30 (quoting S. Rep. No. 109-14, at 43). But that passage simply explains that making a single determination as to whether the aggregate of the individual class members' claims exceeds $5,000,000 is preferable to determining whether *each* class member's claim exceeds $75,000, "as is required by the [pre-CAFA] diversity jurisdictional statute." S. Rep. No. 109-14, at 70. It is not a license to ignore the claims of the individual class members in favor of a named plaintiff's classwide demand.

Moreover, the method Congress selected for determining the amount in controversy under CAFA—"aggregat[ing]" "the claims of the individual class members," 28 U.S.C. § 1332(d)(6)—comports with the nature of a named plaintiff's role in an uncertified class action. In crafting the class complaint, a

named plaintiff is, of course, free to make factual allegations and generally decide which theories of recovery to pursue. But, unless and until the class is certified and the named plaintiff is declared to be the class representative, he is not the master of the "claims" of the absent individuals that flow from those allegations. Those individuals remain the master of their own claims. *See* Resp. Br. 12; *see also Smith*, 131 S. Ct. at 2379–81. And because Plaintiff has no authority to limit the right of absent class members to recover the full value of their claims, the total amount that is actually in controversy before class certification is the sum of each individual class member's claims. *See United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723, 1728–29 (2011) (defining "claim" as the right to relief that arises from a set of "operative facts").

Plaintiff ignores the import of *Tohono*, pointing to one sentence in that opinion for the proposition that the term "claim" can refer either to "a right or demand." Resp. Br. 33 (citing *Tohono*, 131 S. Ct. at 1728–29). *Tohono* goes on to explain, however, that where an allegedly aggrieved party has not yet asserted *any* demand, "claim" must refer to his legal right to recovery. *Tohono*, 131 S. Ct. at 1728–31. Other than Plaintiff, none of the individual class members in this case has asserted any demand against Standard Fire; thus, to aggregate their "claims," 28 U.S.C. § 1332(d)(6), a court must look to their potential right to recovery under the operative facts and causes of action alleged in the complaint.

3. Plaintiff cites three cases from this Court for the proposition that, contrary to the plain language of Section 1332(d)(6), an individual plaintiff's traditional ability to plead around the amount-in-controversy requirement "extends to class actions."

Resp. Br. 18. None of those cases, however, comes close to supporting Plaintiff's argument.

Plaintiff relies primarily on *United States v. Hohri*, 482 U.S. 64, 66 & n.1 (1987), describing that case as a putative class action in which "[t]he named plaintiffs limited requested damages to $10,000 per claim in order to qualify for federal district court jurisdiction and avoid the claims court." Resp. Br. 18. But the only question presented in *Hohri* involved *appellate* jurisdiction that turned on the *type* of claims involved, not the amount in controversy. *See* 482 U.S. at 66 ("[W]e must decide which court [of appeals] . . . has jurisdiction over . . . a case raising both a nontax claim under the Little Tucker Act and a claim under the Federal Tort Claims Act . . . .").

Plaintiff also relies on *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2548 (2011), and *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 622–23 & n.18 (1997), two class actions that this Court decertified because of improper decisions by the named plaintiff in framing the complaint. In *Wal-Mart*, this Court unanimously held that the named plaintiff invoked the wrong provision of Rule 23 and, in so doing, "perverse[ly]" jettisoned absent class members' claims for compensatory damages. 131 S. Ct. at 2559. In *Amchem*, the named plaintiff sought to represent such a "sprawling" class that this Court found he sacrificed the due process rights of absent class members. 521 U.S. at 624. These cases directly refute Plaintiff's argument that courts should not "second-guess . . . the litigation strategies of the named class representative," Resp. Br. 18, and neither case mentions the "master of the complaint" doctrine.

4. The legislative history on which Plaintiff relies likewise fails to support his interpretation of

CAFA. According to Plaintiff, the "most relevant portion[ ]" of CAFA's legislative history is a single parenthetical appearing in the Senate Report that mentions "factual stipulations." Resp. Br. 28; *see also id.* ("'Less burdensome means (*e.g.*, factual stipulations) should be used in creating a record upon which the jurisdictional determinations can be made.'") (quoting S. Rep. No. 109-14, at 44). Based on that reference alone, Plaintiff leaps to the conclusion that his stipulation must be a proper method for establishing the amount in controversy.

But even Plaintiff recognizes (in a footnote) that his so-called "stipulation" is not the type of "factual stipulation" to which Congress was referring. Resp. Br. 28 n.8. A "factual stipulation" (as the name implies) pertains to the undisputed *facts* at issue in the case—for example, that the number of putative class members exceeds 100, or that the events in question took place in Arkansas; such stipulations allow the parties to avoid discovery and the court to avoid the need for fact-finding. *See* S. Rep. No. 109-14, at 44. The Senate Report itself explains that the parties might enter into a "factual stipulation" in which they agree, for example, on the citizenship of putative class members. *Id.* That type of stipulation bears no resemblance to Plaintiff's unilateral pronouncement, in which he purports to limit the substantive rights of others and defeat Standard Fire's right to litigate this case in federal court.

Contrary to Plaintiff's assertions, CAFA's legislative history demonstrates that Congress did not intend to authorize a named plaintiff to unilaterally trump the statutorily prescribed method for calculating the amount in controversy. Congress was determined to prevent the type of gamesmanship exemplified by such stipulations—which historically had

been used to "keep . . . class actions in state court[s], whose judges have reputations for readily certifying classes and approving settlements without regard to class member interests." S. Rep. No. 109-14, at 4; *see also infra* 17–18. CAFA should be interpreted to effectuate that objective. *See Hertz*, 130 S. Ct. at 1195 (rejecting an interpretation of Section 1332 that "would readily permit jurisdictional manipulation").

B. Determining The Amount In Controversy In The Manner CAFA Prescribes Is Not Unmanageable Or Unusual.

Plaintiff also contends that Standard Fire's method of determining the amount in controversy in a class action—the method prescribed by Section 1332(d)(6)—"create[s] an unworkable system that would vastly complicate jurisdictional inquiries." Resp. Br. 22. According to Plaintiff, aggregating the claims of the individual class members "would force courts to conduct full dress rehearsals of the merits (including damages) at the outset of the case," *id.* at 12, and "require[ ] federal district courts to conduct full-blown evidentiary hearings at the removal stage to determine the amount in controversy," "consum[ing] months of activity and millions of dollars in fees and expenses." *Id.* at 2, 26.

Hyperbole aside, Plaintiff's concerns are unfounded. Plaintiff points to no examples in which the determination required by Section 1332(d)(6) has been judicially unmanageable or even required significant judicial resources. Indeed, the district court in this case determined the aggregate amount of the individual class members' claims with little difficulty based on Standard Fire's uncontroverted evidentiary submission. *See* Resp. Br. 9–10.

In some cases, a court may need to weigh "competing jurisdictional calculations," Resp. Br. 25, or estimate "a projected fee award." *Id.* at 26. But federal courts routinely manage those same evidentiary and fact-finding tasks outside the class-action setting, often looking beyond the demand asserted in the complaint when determining the amount in controversy under Section 1332(a). That determination is manageable, in part, because courts need only evaluate whether recovery in excess of the jurisdictional threshold is "legally possible," without deciding whether "the plaintiff *ought* to recover less than the jurisdictional amount." *Smithers v. Smith*, 204 U.S. 632, 644 (1907) (emphasis added).[4]

There is nothing unusual or unworkable about Section 1332(d)(6) requiring district courts to perform a similar function in the class-action context. In fact, the CAFA Senate Report expressly contemplates the occasional need for judicial fact-finding and discovery to determine whether the federal courts have jurisdiction over a class action. *See* S.

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[4] *See, e.g.*, *McMillian v. Sheraton Chi. Hotel & Towers*, 567 F.3d 839, 845 (7th Cir. 2009) (to prove that "future medical expenses and pain and suffering . . . reach the jurisdictional threshold," a party might provide "documentary or testimonial evidence that would show the necessity for future medical treatment of their injuries"); *McPhail v. Deere & Co.*, 529 F.3d 947, 954 (10th Cir. 2008) ("to the extent that a defendant must rely on the federal discovery process to produce [evidence of the amount in controversy,] he may ask the court to wait to rule on the remand motion until limited discovery has been completed"); *Hartford Ins. Grp. v. Lou-Con Inc.*, 293 F.3d 908, 910 (5th Cir. 2002) (per curiam) (if the amount in controversy is not apparent from the face of the complaint, courts may rely on "summary judgment" type evidence); *see also* 14A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3702.3 (4th ed. 2012).

Rep. No. 109-14, at 44 ("[I]n assessing the various criteria established in all these new jurisdictional provisions, a federal court may have to engage in some fact-finding, *not unlike what is necessitated by the existing jurisdictional statutes.*") (emphasis added).

Nor has this Court expressed misgivings about such jurisdictional fact-finding. Indeed, in *Hertz*—a case featured prominently in Plaintiff's brief, Resp. Br. 22–23—this Court held that district courts cannot simply rely on the allegations contained in a pleading to determine a corporation's principal place of business for diversity-of-citizenship purposes. "When challenged on allegations of jurisdictional facts," the Court explained, "the parties must support their allegations by competent proof." 130 S. Ct. at 1194–95.

Plaintiff further argues that courts must be able to "rely on [the] pleadings" when determining the amount in controversy in a putative class action, Resp. Br. 24, and cautions that "a putative class representative's decisions in framing the complaint [should not] be disregarded." *Id.* at 27. Standard Fire *agrees* with Plaintiff that the allegations in the complaint are part of determining the amount in controversy under CAFA—in fact, that is largely why determining the amount in controversy is not as "complicate[d]" as Plaintiff insists. *Id.* at 22. Here, as directed by 28 U.S.C. § 1332(d)(6), Standard Fire presented the district court with a calculation of the aggregated total of the claims of the individual class members that was based on the class definition and the breach-of-contract allegations Plaintiff asserted in his complaint. Plaintiff never disputed this calculation.

III. This Putative Class Action Belongs In Federal Court.

Plaintiff posits a variety of reasons why he believes this case should be adjudicated in state court as a policy matter. But none of those reasons comports with CAFA's language, purpose, or history.

A. Plaintiff describes this case as a "small-damages, intra-state class action[ ]," Resp. Br. 2, and argues that it is "exactly the kind of case that Congress determined should remain in state court." *Id.* at 11–12, 35. But the best way to determine the kind of class action that Congress wanted to be heard in federal court is to examine the statute Congress enacted. CAFA created two bright-line rules, both of which make clear that this case should be in federal court.

First, regarding the amount of potential damages at issue, Congress drew a line at $5,000,000. Thus, any class action in which the amount in controversy exceeds $5,000,000 is large enough to warrant federal jurisdiction, in part because it creates the kind of "'in terrorem' effect," Resp. Br. 41, and "settlement pressure on a defendant," *id.* at 35, that gave Congress cause for concern. It does not matter whether the potential aggregate damages award exceeds the jurisdictional threshold by $24,150 (as in this case, *see* Resp. Br. 10), or by $7,000,000 (as in *Rolwing v. Nestle Holdings, Inc.*, 666 F.3d 1069, 1070–71 (8th Cir. 2012)). Either way, Congress determined that the monetary stakes were large enough for the case to be heard in federal court. *Cf.* Resp. Br. 36 ("The nature of a bright-line jurisdictional threshold is that a complaint under the requisite amount does not trigger jurisdiction, whether the difference is $1 or $1,000,000.").

Second, with respect to the geographic scope of the putative class action, Congress drew a line at minimal diversity—not complete diversity as is required in an individual action under Section 1332(a). Class actions in which "*any* member of a class of plaintiffs is a citizen of a State different from *any* defendant," 28 U.S.C. § 1332(d)(2)(A) (emphasis added), are sufficiently interstate in nature to give rise to federal jurisdiction under CAFA. Both CAFA's statutory findings and legislative history confirm that Congress was concerned with cases just like this one, where out-of-state defendants are hauled into another State's courts and subjected to that State's class-action procedures—even if all of the putative class members reside in the State where the court sits. *See* Pub. L. No. 109-2, § 2(a)(4), 119 Stat. 4, 5 (2005) (discussing "bias against out-of-State defendants"); S. Rep. No. 109-14, at 6 ("ensur[ing] fairness for . . . defendants from one state [that] are sued in the local courts of another state").

Thus, to the extent CAFA demarcated between putative class actions that Congress wanted in federal court and those it was content to leave in state court, this case falls squarely on the federal side of the line.

B. Plaintiff also argues that "[a]ny doubts about the meaning of CAFA should be resolved against federal jurisdiction under the longstanding principle that jurisdictional statutes are narrowly construed." Resp. Br. 21. But there are no "doubts" about how CAFA should be construed in this case—the plain language of 28 U.S.C. § 1332(d)(6) is clear about the method for determining the amount in controversy.

Further, even if there were ambiguity in CAFA's language, Plaintiff's argument that this Court should

apply a presumption *against* federal jurisdiction ignores CAFA itself, which, in substance and effect, abrogated any presumption against federal jurisdiction that might have existed in diversity cases. *See Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830 (7th Cir. 2011) ("There is no presumption against federal jurisdiction in general, or removal in particular. The Class Action Fairness Act must be implemented according to its terms, rather than in a manner that disfavors removal of large-stakes, multi-state class actions."). As the CAFA Senate Report—which Plaintiff embraces (Resp. Br. 4–6, 11, 19, 25, 28–30, 35–39)—explains, "the overall intent of [Section 1332(d)] is to strongly *favor* the exercise of federal diversity jurisdiction." S. Rep. No. 109-14, at 35 (emphasis added); *see also id.* at 43. The Report further states:

> The Committee intends this subsection [1332(d)(6)] to be interpreted expansively. . . . And if a federal court is uncertain about whether all matters in controversy in a purported class action do not in the aggregate exceed the sum or value of $5,000,000, the court should err in favor of exercising jurisdiction over the case.

Id. at 42 (internal quotation marks omitted). That is why all of the cases that Plaintiff cites for the inapplicable presumption *against* federal jurisdiction predate CAFA. Resp. Br. 21–22.

C. Plaintiff goes to great lengths to defend the Arkansas judiciary, particularly the courts of Miller County. Resp. Br. 12, 43–51. But Plaintiff does not dispute that the Arkansas courts take an approach to class actions—particularly class certification—that is *different* from their federal counterparts. *See id.* at

44 (describing the Arkansas Supreme Court's "certify now, decertify later approach to class-action litigation") (internal quotation marks omitted); *see also* Amicus Br. of Arkansas State Chamber of Commerce 15–17.

None of the Arkansas cases cited by Plaintiff rebuts the fact that the Arkansas courts' permissive approach to class actions regularly results in the certification of classes that would almost certainly not meet the federal requirements for certification. *Compare DirecTV, Inc. v. Murray*, 2012 Ark. 366, at *18 (Oct. 4, 2012), *with Wal-Mart*, 131 S. Ct. at 2561; *see also Advance Am. Servicing of Ark., Inc. v. McGinnis*, 300 S.W.3d 487, 492–94 (Ark. 2009) (finding a schizophrenic to be an adequate class representative even though "she has hallucinations in which she sees people and hears voices that are not really there"). Although Plaintiff cites a few cases in which the Arkansas Supreme Court denied class certification, those cases involved unusual circumstances that no court could have possibly found sufficient for class certification. *See, e.g., Faigin v. Diamante*, 2012 Ark. 8, at *7 (Jan. 12, 2012) (declining to certify a class of defendants who did not share a common defense); *Baptist Health v. Haynes*, 240 S.W.3d 576, 582–83 (Ark. 2006) (reversing and remanding a class-certification order where the trial court provided only a single, conclusory sentence finding that the class-certification requirements were satisfied).

Further, even if Plaintiff were correct that "[t]he Arkansas approach is not a blank check for class action," Resp. Br. 45, it is indisputably *not* the same as the federal approach that Congress thought should apply to sizeable, multi-state class actions like this one. Congress enacted CAFA so that out-of-state defendants like Standard Fire could be protected by the

Federal Rules of Civil Procedure and the substantial body of federal law that requires uniform and rigorous enforcement of those rules. *See* Pub. L. No. 109-2, § 2(b)(2), 119 Stat. at 5; S. Rep. No. 109-14, at 4.[5]

In Miller County, in particular, out-of-state defendants are provided no such protections. *See generally* 21st C. Br.; MHI Br. Plaintiff argues that the abuses by the Miller County courts have been exaggerated, providing a letter from the Miller County clerk of court stating "that only a total of 28 class actions have been *filed* in that court since 2000." Resp. Br. 48. But Plaintiff neglects to mention that *one* of those 28 cases (filed in 2005, shortly before CAFA became effective) asserted class action claims against more than 500 separate defendants, nearly all of which were forced to settle pre-class certification. *See* MHI Br. 2; Editorial, *The Colossal Colossus Travesty*, Southeast Tex. Rec., Mar. 28, 2009, http://www2.setexasrecord.com/arguments/218179-the-colossal-colossus-travesty.

We may never know the true number of class actions that have been filed in Miller County, or the true number of out-of-state defendants that have been forced into court there. *See* Resp. Br. 13a ("class action cases do not have a category of their

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[5] It is particularly telling that eighteen States joined an *amicus* brief supporting Standard Fire in this case, even though Standard Fire is arguing that CAFA expanded federal jurisdiction to encompass putative class actions traditionally brought in state court. *See* Br. of Alabama, et al. Only three States filed in support of Plaintiff's effort to keep this case in state court. *See* Br. of Arkansas, et al. One of those States is Mississippi, which does not even allow state-court class actions. *See USF&G Ins. Co. of Miss. v. Walls*, 911 So. 2d 463, 464 (Miss. 2005) (en banc).

own"). But we do know that hundreds of out-of-state companies have agreed to settlements potentially worth multiple billions of dollars—including more than $400 million in fees to Plaintiff's counsel alone—without the Miller County courts holding a single class-certification hearing. MHI Br. 10a–13a.

D. Finally, Plaintiff contends that if procedural developments later make clear that the putative class could recover more than $5,000,000 in damages, then it would be appropriate for Standard Fire to remove at that time—but not before. *See* Resp. Br. 29, 41. The class-action abuses in Miller County, however, render any potential future right of removal illusory because Standard Fire, like many other out-of-state defendants hauled into the Miller County court, could be forced to settle long before anything substantive ever happens in this case. *See* Pet. Br. 13–16. That is exactly what Congress sought to prohibit by enacting CAFA.

CONCLUSION

The district court's order remanding this case to Arkansas state court should be reversed.

Respectfully submitted.

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December 19, 2012

AMICUS CURIAE BRIEF

No. 11-1450

OCT 23 2012

In the
Supreme Court of the United States

THE STANDARD FIRE INSURANCE COMPANY,
Petitioner,

v.

GREG KNOWLES, Individually and as Class Representative on Behalf of All Similarly Situated Persons Within the State of Arkansas,
Respondent.

On writ of certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF ALABAMA, ARIZONA, COLORADO, CONNECTICUT, FLORIDA, GEORGIA, INDIANA, KANSAS, MICHIGAN, NEBRASKA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH DAKOTA, TEXAS, UTAH, WASHINGTON AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

When a named plaintiff attempts to defeat a defendant's right of removal under the Class Action Fairness Act of 2005 by filing with a class-action complaint a "stipulation" that attempts to limit the damages he "seeks" for the absent putative class members to less than the $5 million threshold for federal jurisdiction, and the defendant establishes that the actual amount in controversy, absent the "stipulation," exceeds $5 million, is the "stipulation" binding on absent class members so as to destroy federal jurisdiction?

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INTRODUCTION AND INTEREST OF AMICI CURIAE

The *amici curiae* are States that share a concern about the use of novel class-action procedures to abridge the rights of their citizens. Many of them have implemented state-level reforms to prevent such abuses. Others have intervened in class litigation in the past to challenge collusive or unfair settlements. They have appeared in this case because class-action litigation affects their residents, even if it occurs in the courts of other States.

The stipulation maneuver approved by the lower courts "should raise a suspicious judicial eyebrow." *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 481 (1993). The procedure appears to subvert the interest of absent class members to the interests of the class's lawyers. It allows the class representative and counsel to shop for a pliant local judge to approve a class or settlement. The only logical explanation for the procedure is that counsel wish to avoid important reforms that have been incorporated into federal law, including the requirement that state officers be given an opportunity to challenge the fairness of any proposed settlement. The lower courts' ruling thus raises serious concerns about efficiency, fairness, notice, and adequacy of representation.

These are precisely the concerns that led many States to reform their treatment of class litigation and Congress to enact the Class Action Fairness Act. CAFA provides targeted federal jurisdiction for class actions with minimal diversity and an amount in controversy exceeding $5 million. Once a case is in

federal court, CAFA discourages so-called "coupon settlements" where the consideration offered to the class is in the form of discounts on future products, 28 U.S.C. § 1712, and prohibits discrimination based on the residence of class members, *id.* § 1714. CAFA's removal provision targets cases that are likely to have a nationwide impact; it expressly reserves state-court jurisdiction for "home state" cases in which most of the class members, any defendant, and the injury are all related to the same forum. *See id.* § 1332(d)(4).

The States take no position on whether the class in this case has claims worth more than $5 million. But they are troubled by the decision of the putative class's counsel and would-be representative to cavalierly forfeit the class's right to pursue damages of over $5 million in exchange for the perceived procedural advantage of state court. The States instead support a rule that precludes circumvention of CAFA, incentivizes class counsel to pursue absent class members' legitimate claims regardless of forum, and minimizes the extent to which a putative class representative can shop for a specific judge.

SUMMARY OF ARGUMENT

The experience of the *amici* States demonstrates that class actions are uniquely vulnerable to abuses that subordinate the interest of the class members to the interests of the class's counsel and representative. In the 1990s, class actions were out of control. Certain judges routinely certified nationwide classes without scrutiny and approved inequitable class settlements that provided little compensation for absent class members. Many States recognized these abuses and instituted significant class-action reforms, such as heightened certification procedures, policies disfavoring nationwide classes, and interlocutory appeal of certification orders. The State of Alabama, the lead amicus here, was at the vanguard of both of these trends. Alabama suffered from its share of class-action abuses, but it implemented reforms after those abuses came to light. The States' experience counsels against approving the novel stipulation maneuver at issue here.

The States' experience also demonstrates that state-level reforms are not enough to protect their citizens from class-action abuse. Judgments entered in one State affect citizens in other States, and class litigation in one court generates follow-on litigation in others. The kind of judge-shopping that the lower courts' rule allows is especially problematic and difficult to address through state reforms. Although the freedom to choose between state policies is a happy consequence of Our Federalism, the freedom to shop for a specific, idiosyncratic judge is not. CAFA's targeted grant of federal jurisdiction was a

measured response to the abuses at the turn of the century. It preserves exclusive state-court jurisdiction over local disputes and solves problems that, for the most part, the States themselves cannot easily solve.

Finally, the stipulation maneuver undermines important reforms designed to protect consumers. It binds class members to limited damages without notice or an opportunity to object. This device is particularly problematic given that none of the lower courts determined whether this binding stipulation was in the best interest of absent class members or a fair exchange for the perceived procedural advantage of state court. By remanding this case, the lower courts also relieved the defendants' lawyers from the obligation to notify state regulators about a settlement. Federal law provides state regulators notice and the opportunity to object to class settlements that affect their citizens, and state Attorneys General have used those objections to derail unfair and potentially collusive settlements in the past. Three recent cases, *Honda*, *Sharper Image*, and *DirectBuy*, are good examples of the role that state regulators play in the settlement of class actions.

The lower courts' rule permits putative class representatives to limit the aggregate recovery of all class members to less than $5 million, thereby evading federal jurisdiction and CAFA's important protections. This rule undermines both state and federal reforms, and it invites a return to the days of magnet jurisdictions and judge-shopping. The Court should reverse the lower courts.

ARGUMENT

I. The history of abuse and reform at the state level underscores the importance of meaningful checks on class representatives and class counsel.

The *amici* States' experience has proven class actions to be an important procedural device for efficient consumer litigation, but also uniquely vulnerable to abuse. Because class actions are necessarily large, multi-party affairs, there is much more choice over where to file than in an ordinary two-party dispute. Moreover, because of the leverage of aggregated claims, a court's preliminary decision to certify a class may coerce a defendant to settle, especially when the only alternative is to "bet[] [the] company on a single jury verdict." *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 491 (7th Cir. 2012). Finally, there are the well-established agency problems; "[a] lawyer representing a class is in practical effect a lawyer without a client." *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1199 (9th Cir. 2007) (Kleinfield, J., dissenting), *rev'd, Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011). "Without individual clients to control what they do, [class] lawyers have a powerful financial incentive to [litigate] the case on terms favorable to themselves, but not necessarily favorable to their unknown clients." *Id.*

Given these features, class actions are vulnerable to abuse through devices that subordinate the interest of absent class members to the interests of class counsel and the named class representative.

During the 1990s, some class counsel and representatives wrongly exploited these features. When these abuses came to light, many States *implemented* far-reaching reforms to their own class-action systems. This history of abuse and reform illustrates the "serious reasons for rules constraining class actions," *id.*, and cautions against undermining those rules by validating the binding stipulation maneuver at issue here.

A. A history of localized abuses.

Before CAFA, putative class counsel and representatives could file suit in local courts with "particular judges where the class-action device c[ould] be exploited" through a quick certification order and a rubber-stamped settlement. *Mass Torts and Class Actions: Hearings Before the Subcomm. on Courts & Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. (1998) (statement of Rep. James P. Moran). These judges were known "as 'magnet courts' for the favorable way they treat[ed] [class-action] cases." 151 Cong. Rec. S1225 (Feb. 10, 2005) (statement of Sen. Vitter). *Accord* S. Rep. No. 109-14, at 22-23 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3. Their idiosyncrasies magnified the inherent problems with class litigation.

1. The lead amicus here, Alabama, can provide a firsthand account of why class-action reform was necessary. During the 1990s, class-action abuse was a problem in Alabama, and it was mentioned throughout the Congressional debates on CAFA. *See, e.g.*, S. Rep. No. 109-14, at 14, 24, 26, 61.

One of the problems that motivated CAFA was Congress's conclusion that certain state-court judges were not thoughtful about certifying nationwide class actions. From 1995 to 1997, a total of 91 putative class actions were filed in six Alabama counties. STATESIDE ASSOCS., CLASS ACTION LAWSUITS IN STATE COURTS: A CASE STUDY OF ALABAMA (1998). Judges certified classes in 43 of those cases; in at least 38, the certification was *ex parte* and entered on or shortly after the day the complaint was filed. *Id.* Lawyers coined a colorful term for these quick, *ex parte* certification orders: the "drive-by" class action. *See, e.g.*, *Mitchell v. H & R Block, Inc.*, 783 So. 2d 812, 818 (Ala. 2000) (Hooper, C.J., dissenting).

Unfortunately, some judges were no more rigorous in evaluating proposed class settlements than they were class certification. This lack of diligence led to collusion between named plaintiffs and defendants and unfairness to absent class members. In *Hoffman et. al. v. Bank of Boston*, for example, a homeowner challenged the Bank of Boston's practice of holding too much money in its mortgage escrow accounts, which prevented the homeowners from spending that money until they had paid off their mortgages. *See Kamilewicz v. Bank of Boston Corp*, 92 F.3d 506 (7th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997) (discussing *Hoffman et al. v. BancBoston Mortg. Corp.*, No. CV-91-1880 (Ala. Cir. Ct., Jan. 24, 1994)). The settlement in that case, approved by an Alabama judge, required the bank to return the overages immediately, but also awarded more than $8.5 million in attorneys' fees to be paid by class members out of pocket. *Kamilewicz*, 92 F.3d

at 508-09. The upshot was that many absent class members paid out more in fees than they received in refunds. For one Maine resident, the settlement resulted in a $2.19 credit and $91.33 debit from his bank account. *See Kamilewicz*, 100 F.3d at 1349 (Easterbrook, J., dissenting); *see also, e.g.*, Barry Meier, *Math of a Class-Action Suit: 'Winning' $2.19 Costs $91.33*, N.Y. TIMES, Nov. 21, 1995, at A1, *available at* 1995 WLNR 3836919. Similarly, a Texas resident received no credit and a $144 debit. *See Benn v. BancBoston*, No. 3:96-CV-0974-J, at 2-4 (N.D. Tex. Oct. 4, 1996); Eddie Curran, *You Win, You Pay*, MOBILE REG. (Ala.), Dec. 29, 1999, at 1A, *available at* 1999 WLNR 7248175; Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1054-68 (1996).

2. Alabama was not alone; this was a nationwide problem. In Illinois, a class compromised its false-advertising claims against Poland Spring for a settlement of discounted water and charitable contributions. *See* Edward D. Murphy, *Poland Spring Settles Purity Suit*, PORTLAND PRESS HERALD, Nov. 6, 2003, at 6B, *available at* 2003 WLNR 13471684 (discussing *Ramsey v. Nestle Waters N. Am., Inc. d/b/a Poland Spring Water Co.*, No. 03 CHK 817 (Ill. Cir. Ct., Nov. 5, 2003)). The named plaintiff received $12,000, and the plaintiffs' lawyers received $1.35 million. *Id.* A class in Texas compromised its claim that Blockbuster charged excessive late fees for a settlement of coupons giving plaintiffs $1 off a video rental; meanwhile, the class attorneys received $9.25 million in fees. *See Blockbuster Settles Late-fee Suit with Certificate*

Plan, HOUSTON CHRON., Jan. 13, 2002, *available at* 2002 WLNR 13576864 (discussing *Scott v. Blockbuster Inc.*, No. DI62–535, (Jefferson Cnty., Tex., 2001)). And, in Georgia, a class compromised its claim that Coca-Cola improperly added sweeteners to its drinks for a settlement of 50-cent coupons; the class's counsel received $1.5 million. *Lawyers Get $1.5 Million, Clients Get 50 Cents Off*, FULTON COUNTY DAILY REP., Nov. 21, 1997. *See generally* S. Rep. No. 109-14, at 10-20 (Feb. 28, 2005) (citing examples from Alabama, California, Delaware, Florida, Illinois, Kansas, Minnesota, New York, and Texas).

B. Many States recognized the problem and implemented reforms.

Happily, through a sustained legislative and judicial effort, many States have recognized the inherent problems with class litigation and have implemented important reforms to mitigate them. These state reforms run the gamut from venue rules to certification procedures. And they are ongoing. *See, e.g.*, H.B. 1603 (Okla. 2009) (codified at OKLA. STAT. ANN. tit. 12, § 2023(G)(4)) (providing that in class settlements that provide coupons, class counsel shall be paid in coupons as well).

The lead amicus is a prime example. Thanks to a combination of legislation and judicial decisions, Alabama's class certification process is now more "demanding[ ] than the requirements of Rule 23 of the Federal Rules of Civil Procedure itself." Elizabeth Cabraser, *The Manageable Nation-wide Class: A Choice-of-law Legacy of* Phillips Petroleum

Co. v. Shutts, 74 UMKC L. REV. 543, 548 (2006). The United States Chamber of Commerce now gives Alabama a passing score for its "treatment of class action suits and mass consolidation suits." *See* U.S. CHAMBER INST. FOR LEGAL REFORM, 2012 STATE LIABILITY SYSTEMS SURVEY: LAWSUIT CLIMATE: RANKING THE STATES 12 (2012) ("Treatment of Class Action Suits and Mass Consolidation Suits"). The American Tort Reform Association no longer lists *any* locality in Alabama as a "judicial hellhole." *See* AM. TORT REFORM ASS'N, 2011/2012 JUDICIAL HELLHOLES 6-25 (2012). And Alabama has consistently topped lists of States with the most favorable business climates. *See, e.g.*, SITE SELECTION, TOP TEN BUSINESS CLIMATES (2010); SITE SELECTION, TOP TEN COMPETITIVE STATES OF 2011 (2011); SMALL BUS. & ENTREPRENEURIAL COUNCIL, SMALL BUSINESS SURVIVAL INDEX 2011: RANKING THE POLICY ENVIRONMENT FOR ENTREPRENEURSHIP ACROSS THE NATION 2 (2011) (listing Alabama as Rank 6 of 51).

On this front as well, Alabama has not been alone. The following are three examples of common state-level reforms.

1. Rigorous class certification procedures. Many States have adopted rigorous procedures that a court must follow before certifying a class. In 1997, the Supreme Court of Alabama adopted the rigorous "federal approach" to certification, *Ex parte Am. Bankers Life Ins. Co. of Fla.*, 715 So. 2d 186, 187 (Ala. 1997), and held that "[a] class should not be certified without notice to the defendant." *Ex parte Citicorp Acceptance Co.*, 715 So. 2d 199, 205 (Ala.

1997). The Alabama Legislature later established detailed procedures to govern class certification. *See* ALA. CODE § 6-5-641. The Texas Legislature likewise enacted comprehensive class-action reform, which set out procedures that parties must follow during class-action litigation. *See* H.B. 4, 78 Leg. Reg. Sess. (Tex. 2003) (codified in part at TEX. CIV. PRAC. & REM. CODE § 26.001 et seq.); *see also Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 672 (Tex. 2004) (holding that Texas state courts "must perform a 'rigorous analysis' before ruling on class certification to determine whether *all* prerequisites have been met"). Similarly, Florida now requires that a trial court may "certify a class action only after it determines through rigorous analysis that the elements of the class action rule have been met." *Seminole Cnty. v. Tivoli Orlando Assocs. Ltd.*, 920 So. 2d 818, 824 (Fla. Dist. Ct. App. 2006) (reversing a class certification order). Other States have adopted similar reforms. *See, e.g.*, H.B. 1984 (La. 1997) (codified at LA. CODE CIV. PROC. ANN. arts. 591-97) (setting out procedures that Louisiana courts must follow when certifying a class action); *Beegal v. Park W. Gallery*, 925 A.2d 684, 691 (N.J. 2007) (holding that New Jersey courts should undertake a 'rigorous analysis' to determine if the requirements of the [class-certification] rule have been met").

2. *Disfavoring nationwide classes.* One way to ameliorate abuses in class litigation is to disfavor nationwide class actions in which most of the absent members are residents of other States. By disfavoring nationwide classes, States have decreased the size of classes and the total value of

the class claims—lowering the intensity of the litigation and its effect on other States. Several States have taken this route, either judicially or legislatively. *See, e.g.*, *Ex parte Green Tree Fin. Corp.*, 723 So. 2d 6, 10-11 (Ala. 1998) (decertifying a class in part because "the majority of the members of the purported class are nonresidents whose alleged claims arose in their own states"); *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801, 863-64 (Ill. 2005) (reversing certification of a nationwide class action on *forum non conveniens* grounds); FLA. STAT. § 768.734 (2008) (restricting class actions filed in state court to state residents, with limited exceptions); H.B. 792 (Ga. 2003) (codified at GA. CODE ANN. § 50-2-21) (limiting the jurisdiction of state courts over out-of-state claims).

3. *Immediate appeal of class certification orders.* Because of settlement pressure, the class certification decision is often the only *contested* decision that a court makes in a class-action case. One mechanism to lessen the weight attached to a certification (and to prolong the period during which the class representative and defendant are truly adverse) is to provide for immediate appellate review of the certification order. Many States have done so. *See* H.B. 1027 (Colo. 2003) (codified at COLO. REV. STAT. § 13-20-901); S.B. 19 (Ga. 2005) (codified at GA. CODE ANN. § 9-11-23(g)); H.B. 2764 (Kan. 2004) (codified at KAN. STAT. ANN. § 60-223); H.B. 1211 (Mo. 2004) (codified at MO. REV. STAT. § 512.020(3)); H.B. 394 (Ohio 1998) (codified at OHIO REV. CODE ANN. § 2505.02(B)(5)); H.B. 2008/S.B. 1522 (Tenn. 2011) (codified at TENN. CODE ANN. § 29); H.B. 4

(Tex. 2003) (codified at TEX. CIV. PRAC. & REM. CODE § 51.014(a)(3)).

II. Federal intervention was necessary.

The *amici* States have learned that state-level reform, though an important step forward, is not by itself enough. Congressional intervention, through CAFA, was necessary as well. This is so because, although many States have reformed their class-action procedures, some have not. *See, e.g.*, *Beverly Enters.-Ark., Inc. v. Thomas*, 259 S.W.3d 445, 453 (Ark. 2007) (Arkansas law "does not require that the circuit court conduct a 'rigorous analysis'"). State policy-makers can only be assured that their citizens are protected from class-action abuse if there are universally accepted minimum safeguards for the most significant interstate class actions.

The targeted federal jurisdiction provided by CAFA helps achieve that goal. States cannot coerce each other to adopt particular procedural reforms in their own courts. By addressing the problem of class-action abuse on the federal level, CAFA minimizes the extent to which abuses in any one State can affect the residents of another. *See* S. Rep. 109-14, at 11 (describing the "nonsensical result" of federal courts lacking jurisdiction over class actions with a nationwide impact). CAFA is targeted at class litigation with national implications; it preserves state-court jurisdiction over "home state" cases, 28 U.S.C. § 1332(d)(4), and cases involving state officers, *id.* § 1332(d)(5)(a). The stipulation procedure here undermines Congress's intent to move class actions with national implications into federal court,

and it threatens to create problems that States cannot solve by themselves.

A. Localized abuses have consequences for the residents of every State.

The stipulation maneuver allows class counsel and a class representative to file a purportedly binding waiver of the class's right to recover more than $5 million. *See* ARK. CODE ANN. § 16-63-221 (providing that such waivers are binding). This waiver purports to be binding regardless of whether it is fair to absent class members or whether they receive notice of the waiver. Although the class in this case is limited to Arkansas residents, if the stipulation procedure works here, it will work for nationwide classes as well. The certifications and settlements that this procedure effectuates will affect all States' residents, regardless of where the abuse itself takes place. This will happen in two ways.

1. First and most obviously, class actions permit the courts of one State to "impose their view of the law on other States and bind the rights of the residents of those States." Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(4)(C), 110 Stat. 4, 5. Under the Full Faith and Credit Clause, state courts must respect the prior judgments of courts in other States, so long as the first court properly asserted jurisdiction. *See* U.S. CONST. art. IV, § 1. Given expansive personal jurisdiction, the state courts have broad power to enter binding judgments against nonresident defendants. Add to this mixture the innovation of the nationwide or out-of-state class,

and it becomes clear that a local judge can enter judgments with nationwide impact even if just a few of the named parties have a relationship to the forum. Accordingly, a few judges' inequitable practices can have an impact on States across the country.

These impacts are a special concern when it is a *state* court that enters the judgment, as opposed to a federal court. There is a widespread *perception* that local state judges favor in-state residents over out-of-state residents. That is, after all, the asserted reason for why the Founders provided for diversity jurisdiction. *See, e.g., Pease v. Peck*, 59 U.S. (18 Howe) 595, 599 (1855). It is very likely that this perception is not the reality; there is little evidence that state courts are more likely to favor in-state residents than federal courts are. *See, e.g.*, Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 492-93 (1928). But the *perception* of unfairness is there nonetheless. *See id.*

This perception counsels strongly against the stipulation procedure for a number of reasons. First, nonresident class members and out-of-state regulators are the persons *most in need* of the court's protection from unfairness in the class-action process. The in-state class representative is represented by chosen counsel; the out-of-state parties are not likely at the table. Second, the maneuver here—stipulating away the class's claim to damages in order to remain in state court—itself creates the perception that there is *some* valuable advantage that the class counsel and representative stand to gain by staying in state court. Under these

circumstances, removal to federal court "shore[s] up confidence in the judicial system by preventing even the appearance of discrimination in favor of local residents." *See Class Action Fairness Act of 1999: Hearing on S. 353 Before the Subcomm. on Admin. Oversight & the Courts of the S. Comm. on the Judiciary*, 106th Cong. 96 (1999) (statement of Professor E. Donald Elliott).

2. Second, and somewhat less apparent, is the way that out-of-state judges' decisions affect in-state litigation. By certifying far-reaching classes, judges in one state can create litigation in others. Ordinarily, *res judicata* would minimize the risk of litigation following a class action. But "other state and federal courts are not required to accord full faith and credit to [a constitutionally deficient] judgment." *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 482 (1982). And "adequate representation is among the due process ingredients that must be supplied if the judgment is to bind absent class members." *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 388 (1996) (Ginsburg, J., concurring in part and dissenting in part); *see also Taylor v. Sturgell*, 553 U.S. 880, 904 (2008) (rejecting theory of "virtual representation"). Where, as here, the named plaintiff purports to limit class recovery, it is all but inevitable that the settlement will spawn litigation by dissatisfied absent class members, even if just to recoup the portion of their claims that the named plaintiff purported to stipulate away.

The *Bank of Boston* case provides a good example of the way in which in-state abuses affect out-of-state residents and courts. *See supra* at 7-8. That

settlement was confirmed in Alabama, but it adversely resolved the claims of absent class members from Texas, New Hampshire, and elsewhere. It also governed the escrow practices of a Florida-based bank. By resolving nationwide claims in an apparently unfair settlement, the trial court generated litigation about the effect of the settlement in other States and in the federal system. *See, e.g.*, *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348 (7th Cir. 1996); *Benn v. BancBoston*, (Doc. 89) No. 3:96-CV-0974-J (N.D. Tex. Oct. 4, 1996) (order of dismissal). The apparent unfairness of that settlement led 22 States to file an amicus brief asking this Court to give them "an effective local forum in which absent class members might raise separate and *bona fide* claims of fraud or malpractice against the class' legal counsel or others." Brief Amicus Curiae for the States of New Hampshire et al. in Support of Petitioners, *Kamilewicz v. Bank of Boston Corp.*, 520 U.S. 1204 (1997) (No. 96-1184), 1997 WL 33561347, at *4.

B. Federal jurisdiction is an important check on uniquely problematic judge-shopping.

If the stipulation maneuver here is successful, there will be a race to file class actions in old and new "magnet" jurisdictions across the country. States cannot remedy this kind of judge-shopping, beyond their borders, through their own reforms. And it is uniquely problematic for two reasons.

1. First, the kind of judge-shopping that CAFA was meant to address has much less to do with State policy decisions than it does the personalities of individual judges. Forum-shopping from State-to-State has its proper place in Our Federalism. The freedom to choose one State's law over another's law ensures "that state legislatures remain relevant as centers of policymaking" and guarantees "the binding effect of state law." James E. Pfander, *Forum Shopping and the Infrastructure of Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 355, 355-56 (2008). To the extent parties shop for a forum based on different state policy choices, forum-shopping is merely "the price our system of interstate litigation pays to preserve a measure of state autonomy in the making and enforcement of state law." *Id.* at 359. In other words, that different States make different substantive policy choices is not a bad thing, and people should generally be allowed to choose between them.

But forum-shopping for the purpose of easy class certification is different. This kind of forum-shopping has much less to do with state policy decisions than it does the personality of an individual judge. For example, a single state-court judge certified 30 of the 38 classes that were certified in Alabama between 1995 and 1997. *See* STATESIDE ASSOCS., CLASS ACTION LAWSUITS IN STATE COURTS: A CASE STUDY OF ALABAMA (1998). In light of the choice-of-law rules governing the class members' claims, these cases were most assuredly not filed in Alabama to benefit from Alabama law or policy. They were filed in a specific court in Alabama to benefit from a single judge with an idiosyncratic view of class actions. His

views differed, not just from the federal bench, but from other state-court judges as well. *See, e.g.*, *Ex parte Household Retail Servs. Inc.*, 744 So. 2d 871 (Ala. 1999) (reversing the same judge's class certification order).

It is not important for state sovereignty that litigants be able to shop between individual judges. As this Court has explained under similar circumstances, forum-shopping is acceptable if it is the natural result of legislative action. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1447-48 (2010). But it is "unacceptable when it comes as the consequence of judge-made rules." *Id.* The kind of judge-specific forum-shopping that the lower courts' rule allows is much more akin to the latter than the former. And this forum-shopping most assuredly does not aid a State in creating and effectuating its own substantive law. Had the 30 class actions discussed above, *see supra* 18, been removed to federal court, they would still have been governed by the same state law. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). The only effect of the forum-shopping was to elevate the decisions of a single state jurist.

2. Second, in the class-action context, judge-shopping does not end with the denial of class certification by a particular judge. Class counsel who do not succeed in certifying a class before one judge can try to certify the same class in front of other judges by changing the named representative and filing a new lawsuit. *See Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2381 (2011). Even if "every state in the nation would as a matter of first principles deem

inappropriate a nationwide class," if a single judge sees it differently, then that "single positive trumps all the negatives." *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763, 766-67 (7th Cir. 2003). This asymmetry is a powerful incentive for the continued filing of the same complaints.

There is no doubt that the lower courts' rule incentivizes this kind of never-ending judge-shopping. Just this year, some class-action lawyers comparison-shopped between two counties in Arkansas to find the judge most likely to certify a class. The plaintiffs first filed suit in Sebastian County, Arkansas, were removed to federal court, and then remanded. *See McClendon v. Chubb Corp.*, (Docs. 1, 54) No. 2:11-CV-02034, 2011 WL 3555649 (W.D. Ark. Aug. 11, 2011); *Basham v. Am. Nat'l Cnty. Mut. Ins. Co.*, (Docs. 1, 178) No. 4:12-CV-04005, 2012 WL 3886189, at *1 (W.D. Ark. Sept. 6, 2012). But, when the state judge on remand denied a favorable ruling, the plaintiffs voluntarily dismissed the case and re-filed in the same county where the case below originated. *See Basham*, 2012 WL 3886189, at *1. The defendant then removed the action to federal court, where the plaintiffs "promised not to seek more than" $5 million in damages. *Id.* at *1-2. And the federal district court remanded again. *See id.* at *6 ("Plaintiffs have capped their amount in controversy sufficiently to create a legal certainty that they will not recover more than the federal jurisdictional minimum" under CAFA). These *ad seriatim* filings should not be foisted onto state courts, many of which are currently facing budget cuts and staff shortages.

The *amici* recognize that federal law has a role to play in ensuring a fair and efficient system of interstate litigation. The lower courts' rule raises the specter of a hand-selected judge entering an unfair judgment that affects the lives of countless residents of other States. Although federal jurisdiction should not lightly be presumed, it should also not be conclusively avoided through the stipulation maneuver at issue here.

III. The stipulation maneuver undermines reforms at the federal and state level.

The lower courts' approval of the stipulation maneuver also raises serious questions of notice and fairness to residents of the *amici* States who are absent class members. Under the lower court's rule, absent class members' claims can effectively be settled up-front without notice to themselves or the state regulators charged with implementing the law under which their claims arose. That procedure is bad for consumers and undermines the recognized role of state officials in protecting consumers from unfair settlements. It is particularly ironic that this up-front settlement is designed to avoid CAFA, which was intended to prevent precisely this kind of potential unfairness. The Court should not approve of the stipulation maneuver as a means of avoiding these important federal reforms.

A. The stipulation maneuver makes it harder for absent class members to protect themselves from an unfair settlement.

An absent class member's right to damages cannot be waived by a named class representative, without notice, for a perceived procedural advantage. Neither a state court nor a federal court can "bind" a nonresident class member unless the class member is provided with (1) "the best practicable" notice that is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"; (2) "an opportunity to remove [himself] from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court"; and (3) "an opportunity to be heard and participate in the litigation, whether in person or through counsel." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). None of these protections was afforded to the absent class members in this case before the supposedly "binding" stipulation purported to compromise their claim to damages over an aggregate $5 million. Nor did any of the lower courts—state or federal—weigh whether this limitation was "fair" or otherwise in the interest of the class.

The lower courts' response to these concerns was unpersuasive. The district court below explained that, if absent class members "feel that the limitations placed on the class by Plaintiff are too restrictive," they can simply "opt out of the class and pursue their own remedies." *Knowles v. Standard Fire Ins. Co.*, (Doc. 13) No. 4:11-CV-04044, 2011 WL 6013024, at *6 (W.D. Ark. Dec. 2, 2011). But this could be the response to concerns about the fairness of *any* compromise that a class counsel makes—be it a final settlement or an intermediate one like the

stipulation here. Yet the weight of federal and state law properly recognizes that absent class members are due greater procedural protections than a form notice and right to opt-out. At the very least, before the lower courts accept a stipulation to forgo damages as "binding," the court should determine whether such a stipulation is fair to absent class members.

The lower courts also discounted the potential for abuse by plaintiffs who might later modify their complaints to include greater damages because "it follows that Defendant would have the right to remove again, should removal be justified." *Id.* at *5. Once again, the lower courts ignored the very problem with class-action litigation. Right now, before class certification or settlement talks, the named class representative and his lawyers are truly adverse to the defendant. But it will not always be this way. Instead, once the procedural jousting is over and it becomes clear that a class of some size will be certified, "it is increasingly the corporate defendant that wishes to be sued in a class action" with the largest possible class. John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851, 851 (1995). At that point, when the case is in state court and the writing is on the wall, the defendant and class representative can expand the scope of the class and reach a settlement based on their own interests, without any removal threat and with potentially unfair effects on absent, out-of-state class members. In other words, there is a good reason for the amount in controversy to be decided earlier rather than later.

B. The stipulation maneuver makes it harder for state regulators to protect absent class members from unfair settlements.

The ruling below is also problematic from the States' perspective because they, just like the absent class members, were not given the opportunity to object before class counsel purported to stipulate away the class's claims. In contrast, CAFA mandates that defense counsel provide notice of every class-action settlement within CAFA's purview to the attorney general of any State in which any class member lives or another state official with "primary regulatory or supervisory responsibility with respect to the defendant, or who licenses or otherwise authorizes the defendant to conduct business in the State." 28 U.S.C. § 1715(a)(2). The statute provides the official an opportunity to object within 90 days, *id.* § 1715(d), or otherwise "voice concerns if they believe that the class action settlement is not in the best interest of their citizens," S. Rep. No. 109-14, at 5, *reprinted in* 2005 U.S.C.C.A.N. at 6. It was Congress's expectation that including state regulators in this way would provide an important "check against inequitable settlements." *Id.* at 35.

This objection provision is one of the oft-overlooked provisions of CAFA, but it is nonetheless important. Certain Attorneys General vigilantly objected to unfair settlements when they were called to their attention even before CAFA. *See* Catherine M. Sharkey, *CAFA Settlement Notice Provision: Optimal Regulatory Policy?*, 156 U. PA. L. REV. 1971, 1981-83 (2008) (citing efforts by Texas, New York,

California, and Florida). But they generally "lacked a method for determining the existence of class actions in which they might wish to get involved." *Id.* at 1993. Instead, "[m]ost of the pre-CAFA examples fit a pattern whereby the AGs objected to private settlements when they threatened an internal investigation or ongoing lawsuits" in which the Attorney General was already involved. *Id.* at 1991.

Recently, Attorneys General have used objections to derail collusive settlements that would have harmed in-state consumers. These objections have come in lawsuits across the country:

1. *Honda.* Twenty-five state Attorneys General objected to a proposed class-action settlement with Honda based on allegations that Honda misrepresented the fuel efficiency of its Civic Hybrid. *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1058 (C.D. Cal. 2010). The proposed settlement would pay class counsel $3 million while providing "a DVD that contains tips on improving fuel economy" and partial refunds to consumers. Response Brief Amicus Curiae of the Attorneys General of California et al. in Continued Opposition to the Proposed Settlement Agreement as Amended (Doc. 161) at 2, *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052 (C.D. Cal. 2010) (No. 5:07-cv-00287-VAP-OP). Owners who traded in their car for certain other vehicles could claim either a $1,000 rebate or $100 in cash if they had complained previously. *True*, 749 F. Supp. 2d at 1060-61. Class members who no longer owned the car could receive a $500 rebate. *Id.* at 1060.

The Attorneys General objected on the grounds that the settlement terms "d[id] not amount to meaningful relief for unnamed class members." Brief Amicus Curiae of the Attorneys General of California et al. in Opposition to the Proposed Settlement Agreement (Doc. 120) at 7, *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052 (C.D. Cal. 2010) (No. 5:07-cv-00287-VAP-OP). The DVD was "already available for free on the Internet," and the coupons and injunctive relief were "meager." *Id.* at 2. In contrast, the settlement offered the named plaintiffs $22,500 in incentive payments and the class counsel $2.95 million in attorneys' fees. *True*, 749 F. Supp. 2d at 1062. As the Attorneys General noted, "the chief benefit offered" is "not to unnamed class members." Response Brief at 8, *True*, 749 F. Supp. 2d 1052. The court ultimately rejected the settlement, concluding that "the differential treatment of class members, the low value of the settlement, and the views of the governmental participants outweigh those factors that weigh in favor of approval." *True*, 749 F. Supp. 2d at 1082.

2. *Direct Buy.* Even more recently, the Connecticut Attorney General, joined by thirty-six other States and territories, filed an objection to a settlement of a class-action lawsuit against DirectBuy. Brief Amicus Curiae of the Attorneys General of Connecticut et al. in Opposition to the Proposed Settlement, *Wilson v. Direct Buy Inc.*, (Doc. 161) No. 3:09-cv-00590-JCH, (D. Conn. April 12, 2011). The case alleged that DirectBuy misled members by claiming to sell products directly from manufacturers at wholesale price, when in fact the

company received kickbacks and incentives that increased the cost of the goods. The settlement offered no cash award to class members, only continued or renewed membership in DirectBuy. The Attorneys General argued that the proposed agreement "ha[d] all of the hallmarks of [an] abusive coupon settlement[]." *Id.* at 4. They explained that to receive any benefit from the settlement, absent class members must "either purchase new memberships from [DirectBuy]" or "make sizeable purchases" from select manufacturers and suppliers. *Id.* at 3. This "scant relief" offered to "hundreds of thousands of absent class members nationwide, st[ood] in stark contrast to the $4,000 cash incentive payments to each of the named plaintiffs" and "the $350,000 to $1,000,000 in attorneys' fees to class counsel." *Id.* The judge agreed with the Attorneys General and did not approve the settlement, holding that the agreement was "valueless to more than half the class" and did not fall "within the range of reasonableness." *Wilson v. DirectBuy, Inc.*, (Doc. 243) No. 3:09-cv-00590-JCH, slip op. at 28-29 (D. Conn. May 16, 2011).

3. *Sharper Image.* Similarly, Attorneys General in thirty-five states and the District of Columbia filed an amicus brief urging the court in *Figueroa v. Sharper Image Corp.* to reject a settlement in which class members received no cash award and only a company coupon for $19 per household and a discount on the purchase of a future Sharper Image product. 517 F. Supp. 2d 1292, 1301 (S.D. Fla. 2007). The case arose from a claim by consumers that the Sharper Image Iconic Breeze, which was sold to

purify the air, actually was harmful because it emitted excess ozone. *Id.* at 1294.

The Attorneys General argued that the proposed settlement lacked "meaningful compensation to class members" while at the same time requiring class members to waive remaining claims against the defendant and awarding $1.875 million to class counsel. Brief Amicus Curiae of the Attorneys General of Alaska et al. (Doc. 297-1) at 6, 10, *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1291 (S.D. Fla. 2007) (No. 1:05-cv-21251-CMA). The court ultimately rejected the settlement, citing the "vigor and substance" of the Attorneys General's participation. *Figueroa*, 517 F. Supp. 2d at 1328 ("What distinguishes this case . . . is the singular appearance of the Attorneys General of thirty-five states and the District of Columbia representing hundreds of thousands, if not millions, of eligible class members."). The court "agree[d] with the Attorneys General's view" that the settlement was "of negligible value" to class members. *Id.* Accordingly, it did not comport with the requirements of CAFA and was not "procedurally or substantively fair, adequate, or reasonable" under Federal Rule of Civil Procedure 23. *Id.* at 1329.

CAFA's state regulator objection provision has thus been a positive development for the States and their citizens. It is yet another important protection that the stipulation procedure would circumvent.

* * *

Some would argue that any limitation on the exclusive jurisdiction of state courts is an unjustified intrusion on state sovereignty. But the *amici* States

see it differently. The States cannot force their sister sovereigns to adopt any particular reforms. But CAFA, by limiting the effect of localized class-action abuses on out-of-state residents, puts States in charge of governing themselves. And by affording state regulators notice and the right to object to class settlements, CAFA assists efforts to protect in-state consumers. Given that federal law preserves exclusive state-court jurisdiction over local class actions and that federal courts must apply substantive state law in diversity cases, the lower courts' rule is not justified by an interest in state sovereignty.

The States' experience suggests that the Court should be wary of approving any new procedural device through which a class representative can *limit* recovery by the absent class members that he purports to represent. Class-action abuses were once so widespread that they provoked serious, sustained reforms from state legislatures and judiciaries. And the stipulation maneuver has all the hallmarks of those abuses. It permits class counsel to elude the supervision of state regulators, evade the requirements of due process, and undermine state-level reforms. The best result for the interstate litigation system and for the residents of the *amici* States would be for this Court to reverse.

CONCLUSION

The Court should reverse the Eighth Circuit.

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October 29, 2012

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 11-1450

Supreme Court, U.S.
FILED
DEC 5 - 2012
OFFICE OF THE CLERK

In The

Supreme Court of the United States

THE STANDARD FIRE INSURANCE COMPANY,

Petitioner,

v.

GREG KNOWLES, individually and on behalf of all others similarly situated within the State of Arkansas,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

AMICUS CURIAE BRIEF OF THE STATES OF ARKANSAS, *ET AL.* IN SUPPORT OF THE RESPONDENT

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QUESTION PRESENTED

Whether, after *Smith v. Bayer*, a named plaintiff may defeat removal under the Class Action Fairness Act of 2005 ("CAFA") by filing with a class action complaint a stipulation that limits the damages for the putative class to less than the $5 million threshold for federal jurisdiction.

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INTERESTS OF *AMICI CURIAE*

The matter-at-hand belongs in state court. It involves matters of quintessentially local, rather than national, concern and does not implicate any of the interests that Congress addressed in enacting the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332. The action was filed by an Arkansas plaintiff, proposing a class limited to Arkansas residents, and asserting claims solely under Arkansas law. The case does not involve a nationwide class or the application of any other state's laws. The amount in controversy is capped at $5 million and, therefore, presents no danger of a runaway verdict or undue pressure on Petitioner to settle. An Arkansas statute specifically makes a stipulation binding "with respect to the amount in controversy." *See* ARK. CODE ANN. § 16-63-221(b) (Lexis 2011).

Arkansas and the other states joining this brief as *amici* have a substantial interest in vindicating principles of federalism and in preserving the ability of their citizens to adjudicate controversies within their own jurisdiction.[1] This Court has consistently recognized that "[f]ederal courts are courts of limited jurisdiction," *Kokkenen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994), and has traditionally construed removal statutes narrowly in order to preserve the independence of state courts. *Shamrock*

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[1] The States of Delaware and Mississippi join this brief.

Oil & Gas Co. v. Sheets, 313 U.S. 100, 108-09 (1941). Arkansas and the other *amici* states advocate a similar approach under CAFA.

Accordingly, in the past, many States have filed *amici curiae* briefs opposing unduly expansive interpretations of CAFA. For example, in *State of Oklahoma ex rel. Edmondson v. BP America, Inc.*, No. 10-6171 (10th Cir.), some 38 States submitted a brief *amici curiae* warning against "an overly expansive interpretation of" CAFA and observing that "courts traditionally have construed removal statutes narrowly to effect Congress's intent to limit federal jurisdiction and preserve the independence of state governments."[2] In reasoning that is directly relevant to the Question Presented here, the States explained that "removal jurisdiction must be premised on a case's status at the time of removal," that "a plaintiff is the master of the complaint," and that "plaintiffs, as masters of their complaint, could plead around CAFA's mass action requirements and avoid federal jurisdiction."[3] "[C]ourts should assess a case as filed, and let the jurisdictional chips fall where they may, not rewrite the complaint to achieve or defeat federal

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[2] Brief of Kan., et al., as *Amici Curiae* in Support of Appellee State of Oklahoma, in *State of Oklahoma ex rel. Edmondson v. BP America, Inc.*, No. 10-6171 (10th Cir.), at pp. 16, 27 (filed Sept. 27, 2010).

[3] *Id.* at 23-24 (citing *Anderson v. Bayer Corp.*, 610 F.3d 390 (7th Cir. 2010)).

jurisdiction."[4] "Nothing in CAFA indicates that Congress intended for quintessential state court issues to be decided in federal court."[5] Accordingly, the States urged the Court of Appeals to find a lack of federal subject-matter jurisdiction in that case under CAFA's "mass action" provision, which allows defendants to remove certain "mass actions" from state court to federal court.

Similarly, in *Washington State v. Chimei Innolux Corp.*, No. 11-16862 (9th Cir.), 29 States filed an *amici curiae* brief arguing that "CAFA was not intended to trample on States' sovereign dignity by transforming a quintessentially state matter into a federal case," and urging the court of appeals to take a narrow view of CAFA's "mass action" provision.[6]

The States, therefore, have a significant interest in this case and in the preservation of their respective courts and sovereignty.

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[4] *Id.* at 21.

[5] *Id.* at 27.

[6] Brief of Alaska, et al., as *Amici Curiae* in Support of Appellees Washington State and State of California, in *Washington State v. Chimei Innolux Corp.*, No. 11-16862 (9th Cir.), at p. 3 (filed Aug. 11, 2011).

INTRODUCTION AND SUMMARY OF ARGUMENT

CAFA was not intended to divest state courts of jurisdiction over all class action suits. Instead, state courts were to continue with jurisdiction over class actions of local import and concern. This is such a case: it was brought by an Arkansas plaintiff, proposing a class made up of strictly Arkansas residents, with claims involving only Arkansas law. If, as advocated by Petitioner, federal jurisdiction were to be invoked on the basis of mere suspicion of state courts, the sovereignty of states would be unnecessarily relegated.

Over time, the underlying concept of federalism has become almost rote: the power of the federal government is limited to those specific rights and responsibilities conferred by the Constitution. Jurisdiction over all other matters is to be retained by the states. As a result, federal and state courts enjoy a near co-equal status. Pursuant to long-standing judicial precedent, states are presumed competent to handle complex legal matters involving criminal and civil law, including matters of federal constitutional importance. For a case to be removed from state courts for adjudication by the federal judiciary, federal jurisdiction must be clear. Any doubt should, and must, be resolved in favor of the states and their citizenry.

Neither federal law nor policy dictates that state courts completely mimic their federal counterparts.

Within constitutional boundaries, individual states can freely craft whichever legal and procedural rules that they deem appropriate. The rules regarding the certification of a class action lawsuit are but a single example. Nonetheless, Arkansas, like most states, has based its Rules of Civil Procedure upon the federal rules. Indeed, Arkansas' class certification procedures are intended to require certification procedures in keeping with those under FED. R. CIV. P. 23.

Since the passage of CAFA, Arkansas' appellate courts have routinely reviewed cases involving the certification of proposed class action lawsuits. In conducting this review, these courts have been steadfast in requiring that the Arkansas Rules of Civil Procedure be strictly interpreted and applied. Not all class actions have been certified and not all have been denied. The result is a class action system that works as intended to permit certain claims, involving common issues of fact and law, to be resolved in a single and efficient proceeding, thereby promoting judicial economy.

In 2011, the Arkansas General Assembly enacted ARK. CODE ANN. § 16-63-221 to permit the use of binding stipulations limiting damages. Respondent utilized this statute in a permissive manner to limit available relief in order to litigate its claims of Arkansas law in Arkansas courts. Despite pleas to the contrary, this intent is not contrary to CAFA's terms. Instead, the statute should result in smaller, more discrete, and more manageable classes.

In application, nothing about this stipulation provision changed existing law. Federal courts have repeatedly held that a plaintiff, as the master of his own complaint, can plead around federal jurisdictional limits in order to litigate in state courts. This provision is also unlikely, despite allegations to the contrary, to result in "forum shopping," a term used degradingly to taint the traditional concept of plaintiff's-choice. Even under CAFA, class representatives can formulate claims so as to file in whichever federal district court they deem most favorable. Additional limitations on the ability of these citizens to file class action suits in the court of their choice should result, if at all, from efforts of Congress or state legislatures; they should not result from judicial decree. The judgments below should, accordingly, be affirmed.

ARGUMENT

I. STATE COURTS PROVIDE A NECESSARY, EFFICIENT, AND EFFECTIVE FORUM FOR THE RESOLUTION OF DISPUTES.

A. Principles of federalism require both limited federal jurisdiction and deference to state courts.

The federal government is one of limited jurisdiction; it can exercise only those powers specifically conferred upon it by the Constitution of the United States. *Gregory v. Ashcroft*, 501 U.S. 452, 457-58 (1991). All other rights and powers are reserved to

the states. U.S. CONST. amend. X. This concept, often referred to as "federalism," is the bedrock of our system of governance. Federalism also serves as the basis for our federal and state judicial systems. One is not to supplant the other. Instead, both have specific roles, rights, and responsibilities.

As a general rule, a cause of action is presumed to lie outside of federal jurisdiction. As expressed by this Court as early as 1799, "the fair presumption is (not as with regard to a court of general jurisdiction, that a cause is within its jurisdiction unless the contrary appears, but rather) that a cause is without its jurisdiction, until the contrary appears." *Turner v. Bank of N. Am.*, 4 U.S. 8, 10 (1799). As a result, the burden of establishing federal jurisdiction lies upon the party asserting such jurisdiction. *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 181-82 (1936). Federal jurisdiction must exist by either the constitution or by statute; it cannot be expanded by judicial decree. *Kokkonen*, 511 U.S. at 377.

The burden of establishing federal jurisdiction is not limited to original actions, but also applies to actions involving removal of a case from state court to federal court. The presumption against removal means that any doubts should be resolved in favor of remand. *Shamrock Oil*, 313 U.S. at 108-09. Courts should assess a case as filed and let the jurisdictional chips fall where they may, not rewrite the complaint to achieve or defeat federal jurisdiction. *See generally Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 93 (2005). Stated differently, "[d]ue regard for the rightful

independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Shamrock Oil*, 313 U.S. at 109.

CAFA was not intended to change any of the long-standing rules of limited jurisdiction or state court deference, nor was it intended to limit the ability of consumers to file suit in their home states. This was confirmed by this Court's decision in *Hertz Corp. v. Friend*, 130 S. Ct. 1181 (2010), which involved a potential class of California citizens who brought an action in state court alleging violations of California's wage and hour laws that was removed to federal court under CAFA. This Court followed the traditional approach that "[t]he burden of persuasion for establishing diversity jurisdiction, of course, remains on the party asserting it." *Id.* at 1194 (citing *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994); *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)).

Arkansas and the other *amici* states echo the concern that CAFA should be interpreted with caution and should not be interpreted to overturn long-settled jurisdictional principles. CAFA does not provide *carte blanche* for federal jurisdiction over a state class action any time the statute is ambiguous. The judgments below are consistent with this interpretation of CAFA and should, accordingly, be affirmed.

B. State courts are able to competently certify classes and protect absent class members.

In its brief, Petitioner launches an all-out attack on the ability of state courts to competently adjudicate class action lawsuits. Such attacks are, quite simply, unjustified. Contrary to the arguments asserted by Petitioner, state courts remain an important forum for the resolution of disputes, including class action disputes. As outlined in greater detail *supra*, "under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject to limitations imposed by the Supremacy Clause." *Taffin v. Levitt*, 493 U.S. 455, 458 (1990). Under this system of dual sovereignty, this Court has "consistently held that state courts have the inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States." *Id.*

Where important issues of state law are at issue, the bias in favor of state courts is even clearer. Indeed, under various abstention doctrines, federal courts may refuse to hear cases out of deference to their state court counterparts. For example, under the *Pullman* abstention doctrine, "the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass on them." *Harrison v. NAACP*, 360 U.S. 167, 176-77 (1959). Instead, federal courts should "restrain their authority because of scrupulous regard

for the rightful independence of the state governments and for the smooth working of the federal judiciary." *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 501 (1941) (internal quotations omitted). Similarly, under the *Burford* abstention doctrine, federal courts sitting in diversity jurisdiction may abstain where the state courts are likely to have greater expertise in a particularly complex area of state law. *See generally Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

Despite the foregoing, Petitioner seemingly asserts that, in order to avoid alleged incompetency, impropriety, and bias, practically all class action lawsuits should be subject to federal jurisdiction under CAFA. Pet. 9-10. This contention not only conflicts with the regard afforded to state courts under federal law, but also ignores the ability of state courts to determine, on a day-to-day basis, complex criminal and civil cases, many of which involve life-or-death decisions or issues of broad public policy. For Petitioner to now assert that these same courts are somehow incapable of adjudicating a simple case of fraud, whether in form of a class action or otherwise, is deeply insulting and offends what Justice Kennedy has called the "etiquette of federalism[.]" *U.S. v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring). States must be treated "in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Alden v. Maine*, 527 U.S. 706, 748 (1999); *see also Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*,

506 U.S. 139, 146 (1993) (emphasizing the need to "accord[ ] the States the respect owed them as members of the federation"); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997) (recognizing "the dignity and respect afforded a State").

In support of its argument against state court jurisdiction over class action lawsuits, Petitioner specifically alleges that Arkansas' courts fail to "apply the rigorous protections that federal courts apply under Federal Rule 23." Pet. 10. In essence, Petitioner asserts that if the Arkansas Rules of Civil Procedure do not mirror the Federal Rules of Civil Procedure in wording and application, something is amiss. Within standard constitutional limits, *e.g.*, rights of due process or equal protection, however, states are free to draft their own court rules with whatever variances they deem appropriate. There is no requirement that each state adopt Rules of Civil Procedure that duplicate those imposed at the federal level. Instead, "the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *Lopez*, 514 U.S. at 581 (Kennedy, J. concurring).

Notwithstanding this, the Arkansas Rules of Civil Procedure and the Federal Rules of Civil Procedure, while admittedly not identical, remain substantially similar. Indeed, ARK. R. CIV. P. 23, which like its federal counterpart relates to class action lawsuits, is patterned upon FED. R. CIV. P. 23. The two rules are nearly indistinguishable on the issues of prerequisites for class certification, notice to potential class

members, the manner in which the action is to be conducted, and the manner in which such actions may be settled or dismissed. *Compare* ARK. R. CIV. P. 23 *with* FED. R. CIV. P. 23. In other circumstances, the courts of Arkansas frequently look to the body of law developed under FED. R. CIV. P. 23 for guidance. *See Fraley v. Williams Ford Tractor & Equip. Co.*, 5 S.W.3d 423, 432 (Ark. 1999); *Farm Bureau Mut. Ins. Co. of Ark. v. Farm Bureau Policy Holders & Members*, 918 S.W.2d 129, 130 (Ark. 1996); *Union Nat'l Bank v. Barnhart*, 823 S.W.2d 878, 881 (Ark. 1992). As expressed by the Supreme Court of Arkansas, "the spirit of the federal rule is to be found in our Rule 23 even if all the words are not." *First Nat'l Bank of Fort Smith v. Mercantile Bank of Jonesboro*, 801 S.W.2d 38, 40 (Ark. 1990). "Both set out the same basic requirements for a class action." *Id.*

Petitioner nonetheless alleges that the Supreme Court of Arkansas cannot "be relied upon to protect out-of-state defendants from [class action] abuses. . . ." Pet. 16. In support of this baseless contention, Petitioner highlights two or three cases that it alleges to be at odds with this Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). Pet. 16. Since the passage of CAFA in 2005, however, Arkansas' appellate courts have decided well over 30 cases under ARK. R. CIV. P. 23. Contrary to the claims of Petitioner, not all of the cases decided by the courts of Arkansas have favored class action lawyers or have resulted in the certification of a class action.

In *Baptist Health v. Haynes*, 240 S.W.3d 576 (Ark. 2006), for example, the Supreme Court of Arkansas examined a proposed class action against a hospital which alleged that the hospital charged "self-pay" patients significantly more than those with private or government medical plans. *Id.* at 577. The Supreme Court of Arkansas overturned the trial court's certification of the class, finding the court's analysis insufficient. *Id.* at 581-82. "While the trial court's order recited ten findings of fact and seven conclusions of law, none of those findings or conclusions appear, at this state, to satisfy this court's precedent regarding analysis of the Rule 23 factors." *Id.* The use of class action suits to adjudicate claims was similarly denied in several other cases. *See, e.g., Faigin v. Diamante*, 2012 Ark. 8, ___ S.W.3d ___ (Ark. Jan. 12, 2012) (finding a lack of commonality); *Union Pac. R.R. v. Vickers*, 308 S.W.3d 573 (Ark. 2009); *Teris, L.L.C. v. Golliher*, 266 S.W.3d 730 (Ark. 2007) (remanding class action for failure to properly define class); *Georgia-Pacific Corp. v. Carter*, 265 S.W.3d 295 (Ark. 2007) (finding a lack of commonality); *CenterPoint Energy, Inc. v. Miller County Circuit Court*, 258 S.W.3d 336 (Ark. 2007) (holding that the circuit court lacked subject matter jurisdiction);[7] *Valley v. Nat'l Zinc Processors, Inc.*, 217 S.W.3d 832 (Ark. 2005) (holding that the named plaintiffs were not adequate representatives of the class); *Nat'l*

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[7] Coincidently, the Circuit Court of Miller County, Arkansas, is the court Petitioner alleges to be a "magnet jurisdiction."

Enters., Inc. v. Kessler, 213 S.W.3d 597 (Ark. 2005) (reversing and remanding class action due to lack of notice to class members).

Despite the foregoing, Petitioner argues that Arkansas' protections against class action abuse are insufficient, asserting that Arkansas courts do "not require a rigorous analysis" to questions of class certification. Pet. 16. In the words of Arkansas' highest court, however, this "does not mean that there is no standard at all." *Baptist Health*, 240 S.W.3d at 581 (quoting *Lenders Title Co. v. Chandler*, 107 S.W.3d 157 (Ark. 2003)). Rather, "[t]he trial court must undertake enough analysis to enable us to conduct a meaningful review of the certification issue on appeal." *Id.* Under ARK. R. CIV. P 23, courts must examine six specific factors prior to certifying a class: (1) numerosity, (2) commonality, (3) typicality, (4) adequacy, (5) predominance, and (6) superiority. *Mega Life & Health Ins. Co. v. Jacola*, 954 S.W.2d 898, 901-05 (Ark. 1997). Each of these elements has its own analysis and requirements. *Id.* For certification to be deemed proper, Arkansas courts must provide "more than a cursory mention of the six criteria or bare conclusions that those criteria have been satisfied." *Baptist Health*, 240 S.W.3d at 581. "The trial court cannot simply rubberstamp the complaint." *Id.*

Arkansas has made great inroads to curb class action abuses, while still providing a forum for the resolution of class action disputes. In addition to requiring its courts to engage in a thorough analysis of the class action standards enumerated in ARK. R.

CIV. P. 23, a defendant may appeal class certification on an interlocutory basis. *See* ARK. R. APP. P. 2(a)(9). As noted by the U.S. Chamber Institute for Legal Reform only months ago, this provision of appellate procedure, which only a handful of states have implemented, is a significant class action reform that can be used by states to complement federal requirements. U.S. CHAMBER INST. FOR LEGAL REFORM, 101 WAYS TO IMPROVE STATE LEGAL SYSTEMS 21 (Sept. 2012). In further evidence of Arkansas' efforts regarding class action reform, the Chamber's rating of Arkansas' court system improved by nine places in the last year alone. *See* U.S. CHAMBER INST. FOR LEGAL REFORM, 2012 STATE LIABILITY SYSTEMS SURVEY 7 (Sept. 2012). Other states have worked equally hard to improve class action fairness, while preserving the class action system. Many of these reforms are outlined in the amicus brief submitted by Alabama and others in support of Petitioner. Br. of Ala., et al., 9-13.

The claims made by Petitioner concerning the competency of state courts should be dismissed as little more than "sour grapes." The courts of Arkansas, like the courts of all other states, are fully competent to adjudicate a simple case of fraud, can adequately certify a class, and can protect absent class members. Indeed, as demonstrated herein, the appellate courts of Arkansas have shown great aptitude in policing class action proceedings and curbing alleged class action abuses.

Despite pleas to the contrary, nothing in CAFA indicates that Congress intended for quintessential

state court issues to be decided in federal court. In fact, the Committee Report on CAFA stated that the bill was consistent with "basic federalism principles" and "the intent of the Framers when they crafted our system of federalism." S. Rep. No. 109-14, 109th Cong., 1st Sess. 24 (Feb. 28, 2005). The Report explained that the legislation "promote[d] the concept of federalism and protects the ability of states to determine their own laws and policies for their citizens." *Id.* at 61. As if anticipating the arguments of Petitioner, the Report further noted that "class actions with a truly local focus should not be moved to federal court under this legislation because state courts have a strong interest in adjudicating such disputes." *Id.* at 39. The judgment below is consistent with the text and history of CAFA and should, accordingly, be affirmed.

II. STIPULATIONS UNDER STATE LAW ARE CONSISTENT WITH THE CLASS ACTION FAIRNESS ACT.

In 2011, the Arkansas General Assembly passed a statute permitting plaintiffs to limit available damages. The statute specifically provides that a plaintiff "may, but is not required to, state an amount in controversy for the purposes of establishing subject-matter jurisdiction and determining if the amount sought is within the jurisdictional limits of the court." ARK. CODE ANN. § 16-63-221(a) (Lexis 2011). Such a declaration is binding on a plaintiff, absent amendment under the Arkansas Rules of Civil

Procedure. ARK. CODE ANN. § 16-63-221(b). As explained by the General Assembly in passing this Act, "a plaintiff should be allowed to state with specificity the actual amount sought" and "should be bound by that pleading." 2011 ARK. ACTS 336.

In the matter-at-hand, Respondent used this provision of Arkansas law in a permissible way to avoid federal jurisdiction under CAFA.[8] In doing so, Respondent voluntarily limited potential damages to $75,000 (inclusive of costs and attorneys' fees) for individual class members and $5,000,000 (inclusive of costs and attorneys' fees) for the class as a whole. Pet. App. 75. Respondent further limited the class to Arkansas consumers and pleaded violations of only Arkansas law. App. 65-70. In all, the action was filed by an Arkansas plaintiff, proposing a class limited to Arkansas residents, and asserting claims solely under Arkansas law.

Despite the limited nature of the Arkansas case and the underlying intent of Arkansas' statute to limit damages, Petitioner has asserted that the invocation of federal jurisdiction is warranted under CAFA. Such a step would, however, unfairly intrude

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[8] Generally stated, CAFA creates federal subject-matter jurisdiction (thus allowing removal to federal court) when three conditions are met: (1) an aggregate amount in controversy exceeding $5 million; (2) a putative class with more than 100 members; and (3) minimal diversity, *i.e.*, a class in which at least one member is a citizen of a different state from any defendant. 28 U.S.C. § 1332(d)(2).

on the sovereignty of state courts and would interfere with an action of local concern. Federal jurisdiction cannot be premised on a suspicion of state courts or an assumption that they will improperly apply their own laws.

Neither the actions of Respondent nor the statute enacted by Arkansas represent anything untoward. Rather, both support CAFA and its underlying goals. More specifically, Arkansas' statute, by limiting remedies that can be awarded, should result in smaller, more discrete, and more manageable classes. It should further guard against the alleged class action abuses with which Petitioner is purportedly concerned.

Neither the actions of Respondent nor the Arkansas statute further represent anything new or novel. It has long been held that a plaintiff is the master of his own complaint and can, at his election, plead in a manner to avoid federal jurisdiction. As early as 1938, this Court held that if a plaintiff "does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove. *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938). That this goal is achieved through the filing of a binding stipulation is of no consequence. As outlined by the United States Court of Appeals for the Eighth Circuit in addressing removal under CAFA, a plaintiff may include "a binding stipulation with his petition stating that he would not seek damages greater than

the jurisdictional minimum upon remand[.]" *Bell v. Hershey Co.*, 557 F.3d 953, 958 (8th Cir. 2009). With the submission of such a stipulation, a plaintiff can "ensure that any attempt to remove would [be] unsuccessful. . . ." *Id.* The Eighth Circuit is not alone. The same sentiment has been echoed by other Courts of Appeals. *See, e.g., Freeman v. Blue Ridge Paper Products, Inc.*, 551 F.3d 405, 409 (6th Cir. 2008); *Lowdermilk v. U.S. Bank Nat'l Ass'n*, 479 F.3d 994, 999-1000 (9th Cir. 2007); *Morgan v. Gay*, 471 F.3d 469, 474 (3d Cir. 2006); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 449 (7th Cir. 2005).

Complaints by Petitioner that stipulations permit "forum shopping" also ring hollow. Although commentators may claim that state courts somehow favor plaintiffs and in-state residents, there is little proof of such bias. As outlined by Alabama in its amicus brief supporting Petitioner, "[i]t is very likely that this perception is not the reality; there is little evidence that state courts are more likely to favor in-state residents than federal courts are." Br. of Ala., et al. 15. Those who believe federal courts are fairer are under the false impression that such courts are in some neutral territory outside of this world. Judges and juries in Arkansas' federal courts come from the same place as judges and juries in Arkansas state court proceedings: Arkansas.

The term "forum shopping" represents "little more than a verbal formulation for arguments rejecting, in certain doctrinal contexts, the plaintiff's-choice principle." Antony L. Ryan, *Principles of*

Forum Selection, 103 W. VA. L. REV. 167, 170 (2000). Further, even under CAFA, class action plaintiffs can easily forum shop amongst federal jurisdictions. A class action lawyer can easily file an action in whichever federal court that he believes to be friendlier to his claims. *See* Brian Cabianca, *Arizona Effects of the Class Action Fairness Act*, 42 AZ. ATT'Y 25, 28 (Jan. 2006). As one commentator has noted:

> [A]lthough CAFA was designed to prevent forum shopping, it will likely just result in a different type of shopping. Class counsel eager to avoid litigating in federal court will shop for potential suits in key states where most potential class members live and where most of the injury was suffered. Likewise, class counsel will soon identify and file their class actions in the federal district courts they perceive as being most likely to certify a class.

Id. Waving the red flag of "forum shopping" does not necessarily support federal jurisdiction and is certainly not enough to create it. Forum shopping is something better addressed by Congress and state legislatures, not courts.

In sum, nothing in CAFA bars the use of stipulations by plaintiffs. The statute's congressional history is similarly devoid of any intent to restrict such stipulations. The fact that state law stipulations can be used to avoid federal jurisdiction does little to change long-standing precedent permitting a plaintiff to determine the most appropriate forum for the

resolution of his claims. The judgments below should, accordingly, be affirmed.

CONCLUSION

Based upon the foregoing analysis, this Court should affirm the decision of the United States Court of Appeals for the Eighth Circuit to decline review of the order of remand entered by the United States District Court for the Western District of Arkansas.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-1450

In The
Supreme Court of the United States

THE STANDARD FIRE INSURANCE COMPANY,
Petitioner,

v.

GREG KNOWLES, individually and on behalf of all others similarly situated within the State of Arkansas,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF OF THE ARKANSAS STATE CHAMBER OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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October 29, 2012

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QUESTION PRESENTED

When a named plaintiff attempts to defeat a defendant's right of removal under the Class Action Fairness Act of 2005 by filing with a class action complaint a "stipulation" that attempts to limit the damages he "seeks" for the absent putative class members to less than the $5 million threshold for federal jurisdiction, and the defendant establishes that the actual amount in controversy, absent the "stipulation," exceeds $5 million, is the "stipulation" binding on absent class members so as to destroy federal jurisdiction?

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STATEMENT OF INTEREST[1]

The Arkansas State Chamber of Commerce (the "Arkansas Chamber") respectfully submits this brief as *amicus curiae* in support of the Petitioner.

The Arkansas Chamber is a professional association created to promote commerce and enhance the economic prospects of Arkansas. Approximately 1,200 businesses are members of the Arkansas Chamber. An important function of the Arkansas Chamber is to advocate for a legal climate that supports existing businesses and attracts new businesses to Arkansas.

Arkansas class-action practice is among the most plaintiff-friendly in the United States. State courts in Miller County, Arkansas, are a particular magnet for the abusive class-action attacks on business and interstate commerce that Congress sought to prevent by adopting the Class Action Fairness Act of 2005 ("CAFA"). This case involves a device designed to thwart CAFA. Businesses are wary of doing business in Arkansas, lest they become ensnared in a coercive class action without the ordinary protections of removal to federal court.

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[1] No party or counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have filed blanket waivers with the Court consenting to the submission of all *amicus* briefs.

SUMMARY OF THE ARGUMENT

CAFA responds to abusive class-action rules and practices in state courts by providing federal jurisdiction, hence uniform federal class-action standards, in large class actions that affect national interests. This case was removed from one of the notorious jurisdictions, Miller County, Arkansas, that Congress noted as a trap for national and global companies in abusive class actions. The Arkansas Chamber supports Petitioner's effort to overturn the district court's remand because the remand was based on a device designed to frustrate the federal forum and class-action uniformity that Congress created in CAFA.

Arkansas class-action practice, which Miller County takes to extremes, encourages jurisdictional contrivances that defeat federal jurisdiction because the state practice deviates widely from federal norms and skews overwhelmingly in favor of plaintiffs. Arkansas class-action practice:

- rejects any rigorous analysis in class certification but fails to provide any replacement standard of analysis to guide a trial court's broad discretion;

- presumes the existence of vigorous and competent class counsel, which is one of the class-action requisites challenged by a "stipulation" that gives up rights and recoveries of absent class members to avoid federal jurisdiction;

- refuses to permit any consideration of a "merits" issue on a motion for class certification, approving trial-court refusals to consider matters as basic as *res judicata*, choice of law, and standing before granting class certification;

- certifies abstract questions in huge national class actions that cannot answer any issue for each and every class member in one stroke; and

- certifies cases with predominant individual questions as class actions based on the *expectation* that they will "splinter" into individual cases before reaching judgment, with no consideration of how this will affect due process or preclusion rights of absent class members or the defendant.

These lopsided class-action rules undermine principles of preclusion and due process that any rules allowing class actions must observe. Combined with the discovery abuses and tactics that Petitioner describes in its merits brief, these state-court class-action rules provide an irresistible incentive to plaintiff's counsel to litigate in state court, particularly Miller County, Arkansas, at any cost.

ARGUMENT

As this case demonstrates, Arkansas class-action practice is so favorable to plaintiffs that putative class counsel routinely sacrifice rights and recoveries of absent class members to secure a state-court forum rather than face the scrutiny of a federal court applying federal class-action standards. This pro-plaintiff bias is built on rejection of the federal "rigorous analysis" of class certification and a bright-line rule that an Arkansas court cannot consider the "merits" of a class claim on a motion for class certification. Arkansas courts certify abstract common questions of the kind that this Court rejected in *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011), and employ a "certify now, splinter later" rule that divorces the class-action practice from its ultimate purpose of claim and issue preclusion for all parties.

The Arkansas Chamber will contrast Arkansas class-action practice with federal practice to illuminate stark differences that invite class counsel to resort to jurisdictional contrivances like the "stipulation" here. This Court should reject the stipulation as a device to destroy federal jurisdiction, and it should reverse the district court's order of remand.

I. Arkansas Rejects Rigorous Analysis and Refuses to Consider "Merits" Issues.

At the bottom, Arkansas courts refuse to examine proposed class actions with rigor, do not employ any defined standards, and will not examine "merits"

issues in class certification.[2] The Arkansas Supreme Court acknowledges "the federal courts apply a rigorous-analysis test for class actions, which this court has consistently rejected." *Simpson Housing Solutions, LLC v. Hernandez*, 347 S.W.3d 1, 12 (Ark. 2009) (rejecting the "federal authority" cited by class defendant for class certification standards as "not controlling on this court"); *see also General Motors Corp. v. Bryant*, 285 S.W.3d 634, 641 (Ark. 2008) (citations omitted) ("[W]e have previously rejected any requirement of a rigorous-analysis inquiry by our circuit courts [for class certification].") By contrast, federal practice holds that "certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied[.]'" *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (internal citation omitted).

While Arkansas law explicitly rejects rigorous analysis of proposed class actions, the Arkansas Supreme Court has not provided a replacement standard for lower courts. Instead, it requires only that the trial court "undertake enough of an analysis

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[2] For an example of an Arkansas class action that could not be certified under federal standards, compare *Tyler v. Alltel Corp.*, 265 F.R.D. 415 (E.D. Ark. 2010) (denying class certification) with *Rosenow v. Alltel Corp.*, 358 S.W.3d 879 (Ark. 2010) (reversing trial court's denial of class certification). *See also* F. Ehren Hartz, Comment, *Certify Now, Worry Later: Arkansas's Flawed Approach to Class Certification*, 61 Ark. L. Rev. 707 (2009); John J. Watkins, *A "Different" Top Ten List: Significant Differences between State and Federal Procedural Rules*, Arkansas Lawyer, Winter 2010, at 14-15.

to enable us to conduct a meaningful review." *Lenders Title Co. v. Chandler*, 107 S.W.3d 157, 162 (Ark. 2003). Other than telling trial courts not to "rubber stamp the complaint," *id.*, and to make findings of fact on request of a party, *id.*, the Arkansas Supreme Court does not guide trial courts in exercising their discretion on class certification motions.

Arkansas law actually *presumes* that class counsel "will vigorously and competently pursue the litigation." *USA Check Cashers of Little Rock, Inc. v. Island*, 76 S.W.3d 243, 247 (Ark. 2002). This presumption is brought into question by the "stipulation" practice at issue in this case.[3] Sacrificing the rights and recoveries of absent class members to avoid a federal forum is inconsistent with vigorous and competent representation of the interests of absent class members in Arkansas courts. *Manguno v. Prudential Prop & Cas. Ins. Co.*, 276 F.3d 720, 724 (5th Cir. 2002) ("[I]t is improbable that [plaintiff] can ethically unilaterally waive the rights of the putative class members to attorney's fees without their authorization.").

Arkansas law forecloses most substantial analysis of the putative class claim as a forbidden "merits" inquiry. "'[N]either the trial court nor the appellate court may delve into the merits of the underlying claim in determining whether the elements of Rule

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[3] The "stipulation" device in this case is reminiscent of the "false and fraudulent stipulation" used (unsuccessfully) to defeat the rights of absent plaintiffs who sought to challenge the racial covenant in *Hansberry v. Lee*, 311 U.S. 32, 38 (1940).

23 have been satisfied.' Our court has said on this point that 'a trial court may not consider whether the plaintiffs will ultimately prevail, or even whether they have a cause of action.'" *Bryant*, 285 S.W.3d at 638 (citations omitted). Federal class actions require more: "A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc. ... Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped." *Dukes*, 131 S. Ct. at 2551-52 (internal citations omitted) (emphasis in original).

These fundamental defects in Arkansas class-action procedure lead Arkansas law into extreme positions that are deeply at odds with federal practice and in tension, if not outright conflict, with due process.

A. No Case or Controversy Requirement. Arkansas courts do not require a live case or controversy before they may certify a class for settlement. On a putative class member's objection that the class settlement was reached before the Arkansas class complaint was even filed, the Arkansas Supreme Court stated: "Arkansas concepts of justiciability and subject-matter jurisdiction differ significantly from the concepts based on Article III of the United States Constitution. Accordingly, we will not look to those federal cases for persuasive authority in this case." *Hunter v. Runyan*, 2011 Ark. 43, at 8 n.1, 2011 Ark. LEXIS 38, at *10 n.1. Instead, the Arkansas Court held that subject-

matter jurisdiction for state law purposes arises from Arkansas Rule 23(e)(1)'s requirement that "'[t]he court must approve any settlement, voluntary dismissal or compromise of the claims, issues, or defenses of a certified class.'" *Id.* at 11 (quoting Ark. R. Civ. P. 23(e)(1)(2010)).

Federal subject-matter jurisdiction, of course, requires an actual case or controversy. *E.g.*, *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 754 (1976). This holds for class actions as well as any other federal action. For instance, the Fifth Circuit vacated a class certification because "Petitioners ... never solidified the requisite Article III adverseness between members of the would be class and the [Defendant]." *Sannon v. United States*, 631 F.2d 1247, 1252 (5th Cir. 1980) (citing *Bd. of Sch. Comm'rs v. Jacobs*, 420 U.S. 128, 129-30 (1975)).

Arkansas's special subject-matter jurisdiction for class settlements, boot-strapped from Rule 23 itself, may not bind absent class members. Arkansas's law of claim preclusion requires in part that "the first suit was fully contested in good faith." *Hardy v. Hardy*, 2011 Ark. 82, at 6, 2011 Ark. LEXIS 72, at *8 (citations omitted). Arkansas's law of issue preclusion requires, among other elements, that "the issue must have been actually litigated; ... the issue must have been determined by a valid and final judgment; and ... the determination must have been essential to the judgment." *Id.* Dispensing with the case-or-controversy requirement or the need for adverse parties in Arkansas class actions undermines the elements of preclusion, because there is no assurance that *any claim* was "fully

contested in good faith" or *any issue* was "actually litigated."

B. Standing. Arkansas courts will not examine the standing of the class representative before addressing class certification. *Foremost Ins. Co. v. Miller County Circuit Court*, 361 S.W.3d 805 (Ark. 2010), was a putative class action based on an alleged breach of an insurance contract. Before the trial court considered class certification, the only named plaintiff insured by Foremost first went bankrupt (so that his claim was removed to federal bankruptcy court) and then died. *Id.* at 807. Foremost repeatedly asked the Miller County Circuit Court to rule on its motions to dismiss for lack of standing. The trial court refused based on the "no merits consideration before class certification" rule. *Id.* Lacking a right to appeal, Foremost sought an extraordinary writ from the Arkansas Supreme Court on the ground that the trial court lacked judicial power to proceed. *Id.*

The Arkansas Supreme Court refused relief because "determining whether the plaintiffs lacked standing on the [class] claims ... would involve delving into the merits of the case, which the [trial] court stated it could not do ... until it first addressed the issue of class certification... [W]hile such a determination is permissible in some cases..., it is not required in all cases. ... [T]his court has not considered standing to be a question of subject-matter jurisdiction[.]" *Foremost Ins. Co.*, 361 S.W.3d at 808; *see also Chubb Lloyds Ins. Co. v. Miller County Circuit Court*, 361 S.W.3d 809, 815 (Ark. 2010) ("Arkansas, however, has not followed the

federal analysis and definition of 'justiciability' to include standing as a matter of subject-matter jurisdiction... federal cases based on Article III of the U.S. Constitution are not controlling.'" *Id.* (internal citation omitted)

Federal class-action practice, of course, requires that plaintiffs have standing: "In an era of frequent litigation, class actions, sweeping injunctions with prospective effect, and continuing jurisdiction to enforce judicial remedies, courts must be more careful to insist on the formal rules of standing, not less so." *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449 (2011). Federal class practice further requires that the named plaintiff be a member of the class she seeks to represent. *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 156 (1982).

The federal standing rules supply necessary due-process and preclusion touchstones for the class-action device because adequacy of representation, both concerning the representative's interests and the loyalty and vigor of class counsel, help produce a judgment that binds absent class members. *Hansberry v. Lee*, 311 U.S. 32, 44 (1940). Arkansas, in sharp contrast, permits class actions to proceed without standing and with a deceased person in the driver's seat as class representative. Rather than litigate against a decedent in Miller County Circuit Court, Foremost settled soon after the Arkansas Supreme Court denied extraordinary relief.

C. Res judicata. If a claim has already been resolved in a manner that is binding on the named

plaintiff or the putative class, the class-action device is pointless. Yet under the "no merits" rule, Arkansas class-action practice prohibits any consideration of whether the putative class claim is precluded by a previous judgment. "[D]etermining whether the doctrine of res judicata applies to the [class] claims asserted ...would require this court to evaluate the merits of that affirmative defense, and this court has been clear it will not delve into the merits on appeal from certification." *United Amer. Ins. Co. v. Smith*, 371 S.W.3d 685, 696 (Ark. 2010). By contrast, federal law requires trial courts to determine whether the class claims are precluded, because this is a "very important issue in assessing the adequacy of representation requirement" of Rule 23. *Nafar v. Hollywood Tanning Sys.*, 339 Fed. Appx. 216, 225 (3d Cir. 2009) (vacating class certification because district court failed to consider whether the class claims were barred by res judicata).

Under Arkansas class-action rules, a class defendant in Arkansas could be serially sued by the same class member, for the same claims, with no prospect of judicial relief until after class certification.

D. Choice of Law. According to the "no-merits" rule, Arkansas courts will not conduct a choice of law analysis before certifying multi-state classes. In certifying a nationwide class of four million purchasers of General Motors vehicles with alleged defective brakes, the Miller County Circuit Court refused to address GM's argument "that the significant variations among the fifty-one motor-vehicles product-defect laws defeat predominance

and prevent certification." *Bryant*, 285 S.W.3d at 638. The Arkansas Supreme Court affirmed because "we view any potential choice-of-law determination and application as being similar to a determination of individual issues, which cannot defeat certification." *Id.* at 640.

Federal class-action practice is to the contrary. "In the context of class action certification, the Supreme Court has stated that a district court 'may not take a transaction with little or no relationship to the forum and apply the law of the forum in order to satisfy the procedural requirement that there be a 'common question of law.' A court 'must apply an individualized choice of law analysis to each plaintiff's claims.'" *Nafar*, 339 Fed. Appx. at 220 (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821 (1985)).

Choice-of-law analysis directly touches the due process rights of non-resident absent class members. If Arkansas's substantive laws conflict with the laws of an absent class member's home state, the state courts of Arkansas "'may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them.'" *Shutts*, 472 U.S. at 822 (quoting *Home Ins. Co v. Dick*, 281 U.S. 397, 410 (1930)).

II. Fundamental Differences in Defining Common Issues.

Arkansas and federal courts differ substantially on how to satisfy the class-action requirement of commonality. In *Bryant*, the Arkansas Supreme

Court affirmed class certification of the following "clearly common questions:" "whether the parking-brake system installed in the class members' vehicles was defective and whether General Motors attempted to conceal any alleged defect." 285 S.W. 3d at 642-43. While GM argued that the class claims sounded in fraud and would require each of the four million plaintiffs to prove individual reliance, the Court concluded: "[T]he mere fact that individual issues and defenses may be raised by the defendant regarding the recovery of individual class members cannot defeat class certification where there are common questions concerning the defendant's alleged wrongdoing that must be resolved for all class members." *Id.* at 643.

Federal practice on common issues is sharply different under *Dukes*.

> The crux of this case is commonality—the rule requiring a plaintiff to show that 'there are questions of law or fact common to the class.' That language is easy to misread, since '[a]ny competently crafted class complaint literally raises common questions.' Nagareda, Class Certification in the Age of Aggregate Proof, 84 N. Y. U. L. Rev. 97, 131-32 (2009). For example: Do all of us plaintiffs indeed work for Wal-Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get? Reciting these questions is not sufficient to obtain class

> certification. Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.' This does not mean merely that they have all suffered a violation of the same provision of law.

Dukes, 131 S. Ct. at 2550-51 (some internal citations omitted).

The "clearly common questions" certified under Arkansas class-action practice in *Bryant* would not be certified under federal law. *Dukes* requires the common question to show a common injury—whether "the class members have suffered the same injury,'" so that "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 131 S. Ct. at 2551 (internal citations omitted). *Bryant* allows class certification of any question that is a piece of the larger puzzle of common injury.

It is not clear how a trial on the "common questions" certified in *Bryant* could have led to a nationwide, binding determination of any issue as to any absent class representative. Certainly such an arduous, risky and expensive exercise would not have resolved any "issue that is central to the validity of each one of the claims in one stroke." *Id.* Rather than explore that territory, GM settled *Bryant* soon after this Court denied *certiorari*.

III. Arkansas's "Certify Now, Splinter Later" Approach to Class Certification Imperils Preclusion and Due Process.

Arkansas approves the use of the class action mechanism even when it is clear that the class action will "splinter" and be decertified before judgment. In Arkansas class-action practice, "[w]here a cohesive and manageable class exists, we have held that real efficiency can be had if common, predominating questions of law or fact are first decided, with cases then splintering for the trial of individual issues, if necessary." *Bryant*, 285 S.W.3d at 643. "In fact, we have expressed our approval for the bifurcated approach to the predominance element by allowing circuit courts to divide a case into two phases: (1) certification for resolution of the preliminary, common issues; and (2) decertification for the resolution of the individual issues." *Id.* at 642.

Earlier this month, in another case from Miller County, the Arkansas Supreme Court "recognized that a bifurcated process of certifying a class to resolve preliminary, common issues and then decertifying the class to resolve individual issues, such as damages, is consistent with Rule 23." *DIRECTV, Inc. v. Murray*, 2012 Ark. 366 at 15, 2012 Ark. LEXIS 391, at *21 (Oct. 4, 2012). In federal practice, under *Dukes*, "What matters to class certification . . . is not the raising of common 'questions' — even in droves — but, rather the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation

of common answers." *Dukes*, 131 S. Ct. at 2551 (emphasis in original) (quoting *Nagareda, Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)). Thus *Dukes* emphasizes that the class action mechanism should be used when determination of common issues "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.*

In *Bryant*, as in other class-actions involving a huge number of class members, the actual path to judgment is difficult if not impossible to imagine. The trial court in *Bryant* said it "does not believe for one moment that 4,000,000 individual, phase II trials will be conducted in this case." 285 S.W.3d at 643. Arkansas's answer to this obvious problem in class actions, "certify now, splinter later," virtually assures that absent class members and the defendant will never have their day in court.

The notion of certifying an enormous class action on the premise that the case will "splinter" into individual cases is at war with the requirements for claim and issue preclusion in Arkansas. Claim and issue preclusion both require a judgment. *Hardy*, 2011 Ark. 82, at 5-6, 2011 Ark. LEXIS 72, at *8-9. For claim preclusion, a judgment operates to merge or bar claims that were or could have been tried. *Id.* For issue preclusion, a judgment defines the issues actually litigated and essential to the judgment. *Id.* But a "splintering" case, by definition, never reaches the point of a judgment on a class-wide basis. For there to be binding effects under Arkansas law in *Bryant*, it would be necessary for some or all of the four million claims to reach judgment, a prospect

that Arkansas class-action practice does not seriously entertain.

So Arkansas class-action practice in these large cases dissolves into a fractured process that by design will not result in a class-wide determination of any questions in a manner that can bind absent parties.[4] Given no realistic chance at a trial on the merits that comports with due process, class-action defendants understandably resolve this incoherent judicial conundrum in the boardroom by settlement rather than in the courtroom by trial.

CONCLUSION

The magnet jurisdiction of Miller County, Arkansas is home to notorious class-action abuses

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[4] Arkansas has never had to come to grips with what happens in "splintered" class actions—whether any facts or issues will have been resolved, whether they are binding on any party, and how and where the "splintered" cases will proceed to judgment. Florida has had experience with these issues in its decades-old tobacco litigation, involving 700,000 class members, in *Engle v. Liggett Grp. Inc.*, 945 So.2d 1246 (Fla. 2006) (*"Engle III"*). There the Florida Supreme Court decertified the class after two trials and stated by fiat that certain findings that it approved "will have res judicata effect" in individual damages actions that class members could choose to pursue. *Id.* at 1269. This determination does not resolve due-process concerns, *Hansberry v. Lee*, 311 U.S. at 40, and has spawned uncertainty and confusion in follow-on cases. *See, e.g.*, *Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324 (11th Cir. 2010), *vacating* and *remanding Brown v. R.J. Reynolds Tobacco Co.*, 576 F.Supp.2d 1328 (M.D. Fla. 2008); *Waggoner v. R.J. Reynolds Tobacco Co.*, 835 F.Supp.2d 1244 (M.D. Fla. 2011); *Philip Morris USA, Inc. v. Douglas*, 83 So.3d 1002 (Fla. App. 2012).

that helped prompt Congress to enact CAFA. In this case, some of the lawyers responsible for those abusive tactics attempt to avoid CAFA's jurisdictional rules by sacrificing interests of absent class members as a ruse to remain in state court. This Court should see through that ruse and reject it. The order of remand should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 11-1450

DEC 1 - 2012

In The
Supreme Court of the United States

THE STANDARD FIRE INSURANCE COMPANY,

Petitioner,

v.

GREG KNOWLES,

Respondent.

On Writ Of *Certiorari* To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF *AMICUS CURIAE* THE ARKANSAS TRIAL LAWYERS ASSOCIATION IN SUPPORT OF THE RESPONDENT

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QUESTION PRESENTED

Whether, after *Smith v. Bayer*, 131 S.Ct. 2368 (2011), a named plaintiff may defeat removal under the Class Action Fairness Act of 2005 ("CAFA") by filing with a class action complaint a stipulation that limits the damages for the putative class to less than the $5 million threshold for federal jurisdiction.

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus Arkansas Trial Lawyers Association, Inc. (ATLA), incorporated in 1963, is a voluntary Arkansas legal organization often heard as a friend of the court by Arkansas' appellate courts and, though less often, the United States Court of Appeals for the Eighth Circuit. Its members are attorneys dedicated to protecting the health and safety of Arkansas families, to enhancing consumer protections and to preserving each and every citizen's rights of access to courts and of trial by jury. ATLA's members concentrate their time in the practice of Criminal Law, Commercial Litigation, Domestic Relations/Family Law, Employment Law, Environmental Law, Insurance Law, Personal Injury, Social Security and Workers' Compensation. They often represent defendants as well as plaintiffs in tort and contract cases. They are committed to providing high-quality legal representation for Arkansans.

But ATLA's interests stretch well beyond simply obtaining results for their clients. As members of the Arkansas Bar, ATLA's members are officers of the legal system, and public citizens "having special responsibility for the quality of justice." Arkansas Rules of Court, Model Rules of Professional Conduct,

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[1] Letters of consent to the filing of this brief have been filed with the Clerk. No counsel for any party authored the brief in whole or in part, and no person or entity other than *amicus curiae* made any monetary contribution to its preparation or submission.

Preamble. The goals of ATLA include promoting the efficient administration of justice, working constantly for the improvement of the law and serving as a line of defense against assaults on the integrity, credibility and capability of the Third Branch of Government in Arkansas, the Judiciary.

ATLA sees much of the briefing in this case as such an assault focused on the Circuit Court of Miller County, Arkansas and the Arkansas Supreme Court. ATLA's members are trial and appellate attorneys who regularly, indeed daily, appear in the courts of Arkansas before the very judges whose competence and credibility are questioned by the briefing in this case. ATLA has an interest in shedding the light of truth on the dark condemnation of the trial and appellate courts of our State. The one-sided, unsupported picture painted by Petitioner and several of its *amici* is at best incomplete and at worst dead wrong. It is important that this Court have the full and accurate picture. ATLA submits this brief in order to aid the Court by painting the rest of the picture.

SUMMARY OF ARGUMENT

Petitioner and its *amici* consistently portray the Miller County Circuit Court as a "magnet jurisdiction," a "judicial hellhole," where greedy attorneys for undeserving plaintiffs pursue senseless lawsuits and where the the trial judges presiding over those cases cavalierly certify class actions, refuse to rule on

meritorious dispositive motions, and join the plaintiffs' attorneys in "blackmailing" settlements that benefit only attorneys and short-change plaintiffs. Scratching the thin surface of the support for those contentions reveals that they have no support beyond rhetoric, one-sided hearsay newspaper reports and anecdotes. These newspaper reports and anecdotes are wholly insufficient to support the weighty allegations made against the Miller County Circuit Court.

Examination of the available and reliable facts reveals a different picture. The Clerk's examination of the record indicates very few class-action filings in Miller County. Examination of the scheduling orders appended to those very briefs reveals a trial court that aggressively and admirably moves its complex docket. And examination of the scholarship consistently cited as support for the claims of Petitioners and their *amici* reveals that it does just the opposite. It strongly calls the conclusions they make into question.

Petitioner and its *amici* also portray the Arkansas Supreme Court as doddering and incompetent to protect them and other put-upon defendants from the excesses of the Miller County Circuit Court. The Arkansas Supreme Court created a system, they write, in which trial courts are allowed to shelve merits motions for months or years and they complain that the Arkansas Supreme Court will not take any action to address discovery rulings. They either ignore or are unaware of considerable procedural tools available to them to remedy the excesses they claim exist. They

either ignore or are unaware of efforts of the Arkansas Supreme Court to monitor trial courts and to ensure against trial courts refusing to rule on dispositive motions. And they ignore or are unaware of the exceptions made by the Arkansas Supreme Court to the usual rule that discovery is in the hands of the trial court.

The criticisms of the Miller County Circuit Court and the Arkansas Supreme Court are unjustified. They certainly do not merit reversal of the Eighth Circuit or the Western District of Arkansas. For these reasons, ATLA joins Respondent in asking that the opinion below be affirmed.

ARGUMENT

I. THE MYTH OF THE MILLER COUNTY MAGNET.

Petitioner and its *amici* portray the Miller County Circuit Court in the worst manner possible. They claim that it is, in essence, corrupt, and working hand-in-hand with the plaintiffs' class-action bar to force innocent corporate actors into undeserved settlements in order to avoid disastrous class-action judgments. It is a "magnet" jurisdiction, a "judicial hellhole" where justice gives way to greed with the assistance of sitting judges.

The Miller County Circuit Court accomplishes this goal, they write, by refusing to rule on meritorious

defenses, particularly motions to dismiss for want of personal jurisdiction, until well into the case, often allowing those motions to linger on its docket for months or years. It forces defendants to engage in costly, frivolous discovery that actually motivates settlement where none should be had. These actions by the Miller County Circuit Court, according to Petitioner and its *amici*, motivate plaintiffs' class-action lawyers to file suits in Miller County knowing that the Bench will assist them in backing defendants into the corner making settlement the only viable alternative.

This dark and ominous picture of the Miller County Circuit Court is at best incomplete and distorted and at worst just wrong. Light can be shown on it in three ways: examining the so-called proof or support for the claims made and exposing it for what it really is, nothing more than rhetoric, newspaper articles and anecdotes; examining the actual reliable proof in the record revealing that Miller County is not a "magnet" but a court that admirably and aggressively moves its docket; and mining the scholarship consistently relied on by Petitioner and its *amici*, which reveals that the entire premise of their argument is suspect. That exercise follows.

First, the so-called "proof" or support for the propositions made is insufficient to allow the conclusions reached. A significant portion of the support is made up of nothing more than quotations from and citations to newspaper articles and the remainder is rhetoric and one-sided anecdotes from defendants in

past cases. Petitioner brashly writes at page 14 of its brief that prior to the Class Action Fairness Act's (CAFA), 28 U.S.C. § 1332, passage, Respondent's counsel worked with the Miller County Circuit Court to coerce untoward settlements by allowing "expensive, far-ranging, and burdensome discovery" that Petitioner implies was unwarranted. Its support for this proposition is a newspaper article, Michelle Massey, *'Failure to Communicate' Could Lead to $45 M in Discovery Costs*, Southeast Texas Record, Aug. 8, 2007, and citation to limited portions of papers filed in select cases. On the next page it cites two more press articles for the proposition that class settlements benefit only attorneys not class members, *Big Money for Lawyers*, Arkansas Times, Dec. 14, 2011; *Judge OKs $90M "Click Fraud" Settlement*, Associated Press Financial Wire, July 29, 2006.

Various *amici* engage in a similar exercise. The brief of the Manufactured Housing Institute and others cites 13 press articles, some more than once, for such broad-ranging propositions as defendants in Miller County being subjected to "inappropriate and burdensome discovery" (pages 11 to 16); class-action settlements benefiting only lawyers (pages 16 and 17); and the Miller County Circuit Court making inconsistent rulings benefiting only the plaintiffs (pages 19 and 20). The bulk of the remainder of their support for the same propositions comes from rhetoric and their personal anecdotes describing their view of what happened on various motions brought before the Miller County Circuit Court. The brief of 21st Century Casualty Company and others is the same.

Indeed, both of these *amici* brazenly offer this Court nothing more than their own biased anecdotal perspective on class-action practice in Miller County supported by select portions of the papers filed in select cases backed up by articles from the press.

This approach is inappropriate and ought to be wholly ignored by this Court. If the judges on the Miller County Circuit Court were hailed into court to answer charges from the Arkansas Judicial Discipline and Disability Commission for violations of the Arkansas Code of Judicial Conduct, not one of the plethora of newspaper articles relied on by Petitioner and its *amici* would be allowed into evidence. They are inadmissible hearsay in State court and federal court. Ark. R. Evid. 801; Fed. R. Evid. 801. They are unreliable, incomplete statements not subject to cross-examination that surely would be excluded pursuant to Rule 403 objections even if some hearsay exception could be conjured up. Ark. R. Evid. 403; Fed. R. Evid. 403. This Court should give them exactly the same amount of consideration. None.

The rhetoric and personal anecdotes of parties appearing in front of the Miller County Circuit Court on discreet motions and issues are no different. In both federal court and Arkansas state court, the management of the trial docket and of discovery is left to the sound discretion of the trial court. *E.g.*, *U.S. v. Saccoccia*, 58 F.3d 754, 770 (1st Cir. 1995) ("trial management is peculiarly within the ken of the district court"); *Soobzokov v. CBS, Inc.*, 642 F.2d 28, 30 (2d Cir. 1981); *Drippe v. Tobelinski*, 604 F.3d 778,

783 (3d Cir. 2010) (holding that issues of discovery and case management are within the sound discretion of the trial court); *Hall v. Simes*, 350 Ark. 194, 85 S.W.3d 509 (2002); *Baptist Health v. Circuit Court of Pulaski County*, 373 Ark. 455, 284 S.W.3d 499 (2008). In order for this Court to know whether the Miller County Circuit Court abused that discretion with respect to any one of the complaints Petitioner and its *amici* lodge, this Court would need to examine the entire record relevant to the matter, the arguments made by the parties in their entirety, and the peculiar circumstances of each motion in each case. The one-sided, anecdotal viewpoint of one side or the other, backed up by catchy rhetoric, which is all that is presented, is insufficient. These anecdotes and this rhetoric might be useful in a legislative debate, but they are simply not the stuff that supports a decision of this Court.

Second, what the record actually reveals is important, and short work can be made of it. Again, Miller County is viewed as a "magnet" jurisdiction where class-action complaints are filed with abandon. Addendum B to Respondent's brief reveals something very different. The Miller County Circuit Clerk located only 28 class-action filings from 2000 to now. If Miller County is a magnet, it isn't much of one. Twenty-eight class actions in a 12-year period is a far cry from the picture painted by Petitioner and its *amici*.

And what of this notion that the Miller County Court sits on dispositive motions? The 21st Century

brief includes a letter from one Miller County Judge who informs counsel that "motions relating to Rule 12(b)(2), Rule 12(b)(3), Rule 12(b)(4), Rule 12(b)(5), and Rule 12(b)(8) *are motions that can be heard relatively early in the litigation.*" Brief of 21st Century, appendix A at 2a (emphasis added). Other dispositive motions are heard, according to the court, at or near the certification hearing for reasons of efficiency. *Ibid.* The court then chastises the lawyers on both sides for failing to meet and confer on a scheduling order and tells them to get it done.

Appendix B to the same brief is, apparently, the resulting scheduling order. While some of the briefing in this case contends that the Miller County Circuit Court views the filing of motions to be a waiver of jurisdictional defenses, appendix B reflects just the opposite. And the parties are given concrete, well-defined deadlines under which the case is to progress. Motions are divided into "motion groups" where jurisdiction and venue challenges are heard early and some other dispositive motions are heard later along with certification issues.

The letter from the Miller County Circuit Court and what is portrayed as a typical scheduling order are nothing untoward. They reveal a trial judge who takes control of a complex case on his docket and moves the case. This judge, not one set of lawyers or the other, controls his docket, and admirably so.

Digging to the core, the real complaint made by Petitioner and its *amici* is that they have to comply

with discovery in civil litigation and particularly discovery in class actions that might overlap merits issues with class certification issues. No one enjoys discovery, but it is a necessary component of civil litigation. Plaintiffs cannot obtain the information necessary to prosecute cases, and defendants cannot obtain the information necessary to defend, without detailed, and sometimes voluminous, discovery. It is a reality of litigation. Cutting off discovery is but one step away from barring the courthouse door.

Further, it is both unfair and unrealistic to criticize the judges on the Miller County Circuit Court for allowing merits discovery to proceed simultaneously with certification discovery. As noted earlier, the management of the docket and discovery are within the sound discretion of trial courts. They are things trial courts do. The judges on the Miller County Circuit Court have been tasked with managing the entirety of their dockets including criminal cases, domestic-relations cases, simple and complex contract and tort cases, and the entire panoply of litigation coming before them, not just the 28 class actions filed since 2000. Judicial efficiency and common sense direct that some overlap in discovery is justified just to keep the docket moving. Moreover, "merits" discovery and "certification" discovery often overlap, thus it makes no sense at all to divide discovery into two artificial "phases" that result inevitably in duplication of efforts and motions to compel when one side calls a request "merits" discovery and the other calls it "certification" discovery. The Miller County Circuit

Court's approach is practical, sensible and appropriate.

Third, and finally, a very brief examination of one piece of scholarship offered in support of the claim by Petitioner and its *amici* is telling. A footnote from this article is repeatedly quoted for the proposition that "The most famous magnet jurisdictions are Madison County, Illinois and Miller County, Arkansas." Brief of Petitioner at 4; brief of 21st Century and others at 10; brief of Manufactured Housing Institute and others at 10; brief of the Chamber of Commerce of the United States at 9-10 (each quoting Nan S. Ellis, *The Class Action Fairness Act of 2005: The Story Behind the Statute*, 35 J. Legis. 76, 95 n.115 (2009)) (hereafter Ellis, *supra*). What every one of these briefs omits is the entirety of Professor Ellis's statement. Note 115 actually disputes the premise that either Miller County or Madison County, Illinois is what Petitioner and its *amici* claim it is; a magnet jurisdiction.

The relevant and telling part of footnote 115 is as follows:

> The hellhole label persists in spite of the fact that "empirical research tends to debunk the industry complaints." [Elizabeth G.] Thornburg, [*Judicial Hellholes, Lawsuit Climates and Bad Social Science: Lessons from West Virginia*, 110 W.Va. L. Rev. 1097,] 1104 [(2008)] ("For example, a study of actual data from top hellholes Madison and St. Clair Counties in Illinois concluded that there was

> 'no support for the "hellhole" label.'") (quoting Neil Vidmar et al., *"Judicial Hellholes": Medical Malpractice Claims, Verdicts and the "Doctor Exodus" in Illinois*, 59 Vand. L. Rev. 1309, 1341 (2006)). Thornburg points out that the use of the term is "catchy" and asserts that the "point of the hellhole campaign is not to create an accurate snapshop of reality. The point of the hellhole campaign is to motivate legislators and judges to make law that will favor repeat corporate defendants. . . ." *Id.* at 1099. She goes so far to say that by "sheer repetition" these claims have gained some credibility, noting that "if you repeat something often enough, people will come to treat it as general knowledge." *Id.*

Ellis, *supra* at 93 n.115. The failure to mention the entirety of note 115 is misleading at best.

But the distortion created by quoting Ellis, *supra* for any of the propositions made by Petitioner and its *amici* does not end there. The entire article undercuts the position they take. The point of Professor Ellis's article is that how a "story" is framed often colors the public-policy debate and even the outcome. Where one side can create heroes, villains and victims through which to tell the story, that side can conquer the debate. She posits that advocates of tort reform in general and class-action reform in particular managed to paint state-court trial judges and plaintiffs' lawyers as villains, unsuspecting plaintiffs and innocent corporations as victims and consumers and American competitiveness as the heroes. The result was CAFA,

but neither the story nor the result was supported by actual empirical evidence. It was nothing more than rhetoric, innuendo and anecdote just like the story told by Petitioner and its *amici* here. She concludes that the precise opposite story could be told and better supported.

Professor Ellis's point is well made, and it comes to life in this case. The Miller County Circuit Court is villainized with newspaper articles, rhetoric and anecdote. "Catchy" phrases that have taken on a life of their own are used to make the Miller County Circuit Court appear to be a pawn in a game played by plaintiffs' lawyers when no actual support for the proposition exists. This myth should be put to rest. This Court ought not countenance the attack on this trial court, and it certainly should not allow it to undercut the opinion under review.

II. THE ARKANSAS SUPREME COURT'S APPELLATE AND SUPERVISORY CHECK.

Petitioner and its *amici* criticize the Arkansas Supreme Court for failing to check the described excesses of the Miller County Circuit Court, or at least to provide any means through which to check them. The first response is that the excesses do not exist, as explained above. The second response is that if they did, the Arkansas Supreme Court has in fact created strong appellate and procedural checks to protect against them. They are explained here in very brief fashion.

By virtue of our State constitution, "The Arkansas Supreme Court shall exercise general superintending control over all courts of the state. . . ." Ark. Const., amend. 80, § 4. It is similarly charged with prescribing "the rules of pleading, practice and procedure for all courts" of the State, Ark. Const., amend. 80, § 3, a role it zealously and jealously defends. *E.g.*, *Broussard v. St. Edward Mercy Medical Health System, Inc.*, 2012 Ark. 14, ___ S.W.3d ___ (2012); *Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, 308 S.W.3d 135 (2009); *Summerville v. Thrower*, 369 Ark. 231, 253 S.W.3d 415 (2007). Relevant to the complaints raised in this case, the Arkansas Supreme Court has flexed this judicial muscle in ways that would protect Petitioner and its *amici* if their problems really existed.

Arkansas is actually an advance thinker on review of class certification. Every class-certification order is subject to appeal, whether granted or denied, as a matter of right. Ark. R. App. P. – Civil 2(a)(9). The Arkansas Supreme Court assumes jurisdiction of each and every such case without a prior stop at the Arkansas Court of Appeals. See *Carquest of Hot Springs v. General Parts, Inc.*, 367 Ark. 218, 238 S.W.3d 53 (2006). This immediate review alone is a substantial check on any alleged abuse by a circuit court.

Our State Supreme Court also checks any effort on the part of a trial court to shelve dispositive motions and refuse to rule on them. That check begins with Administrative Order No. 3 of the Arkansas

Supreme Court. This Order requires trial courts to report quarterly all cases that have been under final submission for more than 90 days. Ark. S.Ct. Admin. Order No. 3(2)(A). Where a dispositive motion is fully briefed and argued, a case is considered "under final submission." Ark. S.Ct. Admin. Order No. 3(2)(B).

This order has teeth. If a delay is not caused by the parties or counsel, the Supreme Court may assign a judge to dispose of the case. Ark. S.Ct. Admin. Order No. 3(2)(D). Non-compliance with the order carries weighty penalties for the offending judge as follows:

> Willful noncompliance with the provisions of the order shall constitute grounds for discipline under the provisions of Canon 3B(8) of the Arkansas Code of Judicial Conduct. Any judge whose quarterly report is not received by the 15th of the month following the end of the previous quarter (i.e., January 15, April 15, July 15, October 15) will be automatically referred to the Judicial Discipline and Disability Commission for possible discipline.

Ark. S.Ct. Admin. Order No. 3(2)(E).

Parties to cases need not wait for the Arkansas Supreme Court to act where an Arkansas trial judge refuses to rule on a dispositive order. Where a trial judge refuses to rule in a reasonable time, the Arkansas Supreme Court entertains and issues writs of mandamus to require a ruling. *Higgins v. Proctor*, 2009 Ark. 496, ___ S.W.3d ___ (2009); *Hall v. Simes*,

350 Ark. 194, 85 S.W.3d 509 (2002); *Urquhart v. Davis*, 341 Ark. 653, 19 S.W.3d 21 (2000). It is unrealistic that a trial court would ignore the mandates of Administrative Order No. 3 and subject itself to being replaced on a case or sanctioned for misconduct, and it is just incorrect that the parties to the case have no enforcement arrows in their quivers to obtain rulings.

Finally, Petitioner and its *amici* complain that the Arkansas Supreme Court will not review discovery orders on an interlocutory basis. As a general proposition, that is true. *Baptist Health v. Circuit Court of Pulaski County*, 373 Ark. 455, 284 S.W.3d 499 (2008); *Chiodini v. Lock*, 373 Ark. 88, 93, 281 S.W.3d 728, 732 (2008). It is not, however, unusual. The typical rule is that discovery orders are not subject to immediate appellate review. Cassandra Burke Robertson, *Appellate Review of Discovery Orders in Federal Court: A Suggested Approach for Handling Privilege Claims*, 81 Wash. L. Rev. 733 (2006); Comment, *Reviving the Privilege Doctrine: The Appealability of Orders Compelling the Production of Privileged Information*, 62 Ark. L. Rev. 283 (2009).

That approach makes perfect sense. Interlocutory appellate review to control discovery disputes has no logical end and would embroil the appellate courts in all manner of discovery issues in the middle of litigation. Parties argue robustly, to say the least, over what can and cannot be discovered. Discovery is the engine that powers the civil suit at the trial-court level. If appellate courts open the door to refereeing disagreements over what the discovery rules mean by

way of interlocutory review, the volume of cases rushing through that door will be daunting.

Trial courts are vested with jurisdiction to decide discovery issues with good reason: they are in the best place to do so. Trial courts deal daily with discovery matters. They are well-versed in the Rules and are familiar with the cases before them and how the discovery sought fits within the case as a whole. They are familiar with the parties and their counsel, or at least more so than appellate courts can be. They are simply better suited to make day-to-day rulings on discovery issues. Discovery is a large part of what trial courts do, and no need exists to create appellate jurisdiction to review every decision that is disagreeable to one party or another.

Allowing interlocutory appellate review of discovery orders would be inefficient and would bog down cases preventing resolution of disputes. Both sides in a dispute deserve a fair, efficient and timely resolution to a case. If immediate appellate review is available to resolve discovery disputes, every case faces the real possibility of delay. That delay is not fair, efficient or timely.

Even so, as with most things, Petitioner and its *amici* overstated their position. It is not correct that the Arkansas Supreme Court refuses to entertain interlocutory-type review of *any and all* discovery orders. The Arkansas Supreme Court recently adopted a Rule change allowing discretionary review of any discovery order "compelling production of discovery or

an order denying a motion to quash production of materials pursuant to Rule 45 when the defense to production is any privilege recognized by Arkansas law or the opinion-work-product protection." Ark. R. App. P. – Civil 2(f)(1). Even before the Rule change, review by extraordinary writ was available under some circumstances. *Cooper Tire & Rubber Co. v. Phillips Cnty. Circuit Court*, 2011 Ark. 183, ___ S.W.3d ___ (2011).

This considered and advanced approach to appellate jurisdiction over discovery issues once again reveals a forward-thinking court, not the doddering incompetence Petitioner and its *amici* want to discuss. It allows run-of-the-mill discovery disputes to be decided in the trial court subject to typical appellate review as they should be. Then it opens the door to immediate review of extraordinary issues where the important rights of the parties are at stake and the circumstances of the case so warrant. The criticism launched toward the Arkansas Supreme Court for its approach to discovery is not warranted.

CONCLUSION

Petitioner and its *amici* attack the Miller County Circuit Court with rhetoric, newspaper articles and anecdotes, not proof. When the thin surface of their accusations is scratched, a different story is revealed, one of a trial court that moves the few cases on its class-action docket admirably. The attacks on the

Arkansas Supreme Court fare no better. This State's Supreme Court is forward thinking, providing administrative and appellate checks to any abuses that may exist. The attacks on the Miller County Circuit Court and the Arkansas Supreme Court are unwarranted and certainly do not justify reversal.

Respectfully submitted,

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December 4, 2012

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
OCT 29 2012
OFFICE OF THE CLERK

No. 11-1450

In The
Supreme Court of the United States

THE STANDARD FIRE INSURANCE COMPANY,
Petitioner,
v.
GREG KNOWLES,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Whether, consistent with the Due Process Clause of the Fifth Amendment and the Class Action Fairness Act of 2005, a named plaintiff may stipulate that the amount in controversy, including the claims of absent class members, does not exceed $5 million so as to defeat a defendant's right of removal.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*. This case is important to Cato because it concerns the due process rights of absent class members and the abuse of the class action mechanism that is a vital part of the federal civil justice system.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Class actions are an exception to the due process requirement that "one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. 32, 40 (1940).

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution intended to fund the brief's preparation or submission. Letters from the parties consenting to the filing of this *amicus* brief are filed with the Clerk.

Money damages class actions under Rule 23(b)(3), codified in the 1966 class action amendments, were considered at the time to be "the most adventuresome innovation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (internal quotation marks omitted). Indeed, unlike the mandatory class actions encompassed in Rules 23(b)(1) or (b)(2), concerning, respectively, limited funds and injunctive or declaratory relief, "Rule 23(b)(3) permits certification where class suit 'may nevertheless be convenient and desirable.'" *Id.* at 615 (quoting Adv. Comm. Notes, 28 U.S.C. App. at 697). Accordingly, the courts must be especially vigilant at the outset of money damages class actions to ensure that absent class members' claims are not traded away by self-interested named plaintiffs and their counsel.

In particular, this Court has long held that, for a money damages class action to be certified and due process satisfied, absent class members must be provided notice, an opportunity to exclude themselves from the class, and adequate representation. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). This fundamental rule presupposes that actions that may bind absent class members not be taken *before* a certification decision and an opportunity for absent class members to decide whether to be members of the class. The class certification requirements ensure that the named plaintiff and counsel are adequate to represent the class, providing further guarantee that the due process rights of class members are protected. *Id.* Indeed, representation without certification is

anathema to due process. It is also at odds with the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) ("CAFA"), which was enacted, in part, to prevent self-serving tactics by class action plaintiffs' lawyers who are more concerned with their fees than with the recovery to the class. 151 Cong. Rec. S1157, 1178 (2005) (statement of Sen. Hatch) ("Abuse of the class action system has reached a critical point, and it is time that we as a legislative body address the problem.").

Permitting counsel for the would-be representative of an uncertified class to enter into a "binding" stipulation limiting the relief sought by the class in order to avoid federal jurisdiction violates the due process rights of absent class members. It also conflicts with the purpose of CAFA, inherent in its text, to provide a federal forum that will protect absent class members from the self-serving and abusive tactics of plaintiffs' attorneys. The possibility of later notice to the class cannot, as a legal and practical matter, cure such a fundamental violation of absent class members' rights.

ARGUMENT

I. Due Process Requirements Preclude Pre-Certification "Stipulations" that Trade Away Class Members' Claims

Like other devices that attempt to trade away absent class members' claims so that a class action

may proceed in a preferred forum, pre-certification "stipulations" violate absent members' due process rights.

This Court's seminal decision in *Shutts* holds that due process in a money damages class action requires that an absent class member "receive notice plus an opportunity to be heard and participate in the litigation," that he "be provided with an opportunity to remove himself from the class," and "that the named plaintiff at all times adequately represent the interests of the absent class members." *Shutts*, 472 U.S. at 812; *see Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950). These requirements are fundamental because "the right to be heard ensured by the guarantee of due process 'has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.'" *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 799 (1996) (quoting *Mullane*, 339 U.S. at 314). To the extent that adequacy of representation alone may suffice to protect absent members' rights, it is constitutionally insufficient where "the interests of those class members who had been a party to the prior litigation were in conflict with the absent members who were the defendants in the subsequent action." *Id.* at 801.

These principles have led the Court to reject mandatory class actions under Rules 23(b)(1) and (b)(2) when the plaintiffs' objective is aggregated money damages. *See, e.g., Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999). The Court unanimously

reaffirmed that holding in *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2559 (2011), rejecting an attempt to limit damages to back pay claims, so as to fall under the requirements of a Rule 23(b)(2) mandatory class action, because it "created the possibility . . . that individual class members' compensatory-damages claims would be *precluded* by litigation they had no power to hold themselves apart from," in violation of the Due Process Clause.

Historically, the tactics used by named plaintiffs' attorneys to obtain certification for suspect money damages class actions have not been limited to disguising those actions as limited fund or injunctive or declaratory relief actions, but have extended to trading away (in whole or in part) the claims of absent class members. This includes trimming causes of action or remedies in an effort to achieve certification, without regard to the potential preclusive effect of their decisions on absent class members. *See, e.g.*, *Pearl v. Allied Corporation*, 102 F.R.D. 921, 922-23 (E.D. Pa. 1984) (refusing to allow selective pleading of claims); *Feinstein v. Firestone Tire and Rubber Co.*, 535 F. Supp. 595, 606 (S.D.N.Y. 1982) (finding that the named plaintiff's tailoring of claims came "at the price of presenting putative class members with significant risks of being told later that they had impermissibly split a single cause of action"); *Krueger v. Wyeth, Inc.*, No. 03-cv-2496, 2008 WL 481956, at *2-4 (S.D. Cal. Feb. 19, 2008) (denying certification where the named plaintiff's attempt to split off claims of class members who had actually suffered

injuries revealed her to be an inadequate class representative). *See also Arch v. American Tobacco Corporation, Inc.*, 175 F.R.D. 469, 480 (E.D. Penn. 1997) ("[N]amed plaintiffs who would intentionally waive or abandon potential claims of absentee plaintiffs have interests antagonistic to those of the class.").

Plaintiffs' attorneys have employed similar tactics to attempt to evade federal jurisdiction in favor of state courts that may be friendlier to class actions and less protective of absent members' rights. This includes arbitrarily breaking up a claim into separate causes of action, each covering discrete periods dating from the beginning of the statute of limitations period and each asserting damages below $5,000,000. *See, e.g.*, *Freeman v. Blue Ridge Paper Products, Inc.*, 551 F. 3d 405, 406, 408-09 (6th Cir. 2008) (ordering aggregation where plaintiffs' counsel created five separate nuisance classes, each covering a different six-month interval and stipulating to recovery just below the CAFA jurisdictional threshold); *Hubbard v. Electronic Arts, Inc.*, Nos. 2:09-CV-233, 2:09-CV-234, 2011 WL 2792048, at *7 (E.D. Tenn. July 18, 2011) (following *Freeman*); *Tanoh v. Dow Chemical Co.*, 561 F.3d 945, 955 (9th Cir. 2009) (denying removal of seven toxic-tort suits, each with fewer than 100 plaintiffs); *Anderson v. Bayer Corp.*, 610 F.3d 390, 392-93 (7th Cir. 2010) (denying removal of four interrelated classes, each with fewer than 100 plaintiffs).

What these tactics have in common is that they serve to advance the interests of named plaintiffs and

their counsel by abrogating or even discarding the claims of absent class members, in blatant violation of "our 'deep-rooted historic tradition that everyone should have his own day in court.'" *Richards*, 517 U.S. at 798 (quoting *Martin v. Wilks*, 490 U.S. 755, 762 (1989)). The case at bar, in which the named plaintiff stipulated to a damages amount for the class below the $5 million CAFA threshold to avoid federal jurisdiction, exemplifies this conflict.

II. Due Process Requires Satisfaction of Rule 23 Criteria, Including Adequacy of Representation, *Before* Absent Class Members May Be Bound

"In the class-action context, [constitutional due process] limitations are implemented by the procedural safeguards contained in Federal Rule of Civil Procedure 23." *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008). Compliance with those safeguards thereby assumes a constitutional dimension and must be achieved *before* non-named class members' legal rights may be determined.

Consistent with this principle and its precedents, the *Smith* Court rejected "'the novel and surely erroneous argument that a nonnamed class member is a party to the class action-litigation before the class is certified'" under Rule 23. *Smith v. Bayer Corp.*, 131 S.Ct. 2368, 2380 (2011) (quoting *Devlin v. Scardeletti*, 536 U.S. 1, 16 n.1 (2002) (Scalia, J., dissenting)). It recognized that certification decisions matter because

the Rule 23 requirements measure whether the named plaintiff and counsel adequately represent the interests of the class, such that class members may be fairly subject to *res judicata*. *Id.* at 2381 n.11.

As *Shutts* emphasizes, "the Due Process Clause . . . requires that the named plaintiff at all times adequately represent the interests of the absent class members." 472 U.S. at 812 (citing *Hansberry*, 311 U.S. at 42-43); *see also* Restatement (Second) of Judgments § 4(1), at 393 (1982) (nonparty may be bound only when his interests are adequately represented). The Federal Rules of Civil Procedure implement this requirement. Rule 23(a)(4) provides that the named plaintiffs must "fairly and adequately protect the interests of the class." *See also Amchem*, 521 U.S. at 625. It also imposes the same requirement on the named plaintiffs' counsel. Fed. R. Civ. P. 23(g)(4).

But fair and adequate representation is precisely what is missing when a named plaintiff and his counsel are so keen to have a class certified in a friendly forum that they sacrifice potential damages for the class in order to achieve that goal.[2] Accordingly,

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[2] The importance of adequate representation for absent class members is underscored by the ability of absent members who were not adequately represented to collaterally attack a class judgment and thereby escape its *res judicata* effect. In *Dow Chemical Co. v. Stephenson*, 593 U.S. 111, 112 (2003), an equally-divided Court affirmed the Second Circuit's decision that it would violate due process for a global settlement that did not address future claimants' claims to have *res judicata* effect in

(Continued on following page)

such stipulations limiting class-wide damages not only raise the risk of unfair and inadequate representation, they reveal that it is likely in a given case. The requirements of due process therefore preclude holding a damage-limiting stipulation to be binding on absent class members, unless and until the named plaintiff has *demonstrated* adequacy of representation – that is, after class certification.

Notwithstanding this clear violation of absent class members' due process rights when binding decisions are made for them by a named plaintiff and his counsel prior to class certification, the circuit courts are divided on the rights of absent class members in these circumstances. *See, e.g., Rolwing v. Nestle Holdings, Inc.*, 666 F.3d 1069 (8th Cir. 2012) (upholding named plaintiff's counsel's stipulation to avoid federal jurisdiction as binding and sufficient to defeat removal under CAFA); *Frederick v. Hartford Underwriters Ins. Co.*, 2012 WL 2443100 (10th Cir. June 28, 2012) (holding that a plaintiff cannot conclusively avoid federal removal jurisdiction under CAFA by a statement of intention not to seek more than $4,999,999.99 on behalf of the putative class); *Back Doctors Ltd. v. Metro. Prop. & Casualty Ins. Co.*, 637

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barring future claimants from proceeding. *See Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 259-61 (2d Cir. 2001). As the Second Circuit explained, "the due process inquiry (and part of the Rule 23(a) class certification requirements) involves assessing adequacy of representation and intra-class conflicts." *Id.* at 261.

F.3d 827, 830 (7th Cir. 2011) (holding that the amount a named plaintiff is willing to accept does not bind absent class members and therefore does not ensure that the case will remain below the CAFA threshold); *Lowdermilk v. U.S. Bank Nat'l Ass'n,* 479 F.3d 994, 996, 999 (9th Cir. 2007) (requiring the "legal certainty" test, notwithstanding the allegations in the complaint, in order to "guard the presumption against federal jurisdiction and preserve the plaintiff's prerogative, subject to the good faith requirement, to forgo a potentially larger recovery to remain in state court."); *Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 405, 407 (6th Cir. 2007) (holding that a "disclaimer in a complaint regarding the amount of recoverable damages does not preclude a defendant from removing the matter to federal court"); *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 724 (5th Cir. 2002) (finding it "improbable" that the named plaintiff can "ethically" and "unilaterally" waive the rights of the absent class members).

The result is that, depending entirely on where a suit is brought, absent class members may find their claims traded away before the minimum requirements of due process have received any consideration.

III. The Eighth Circuit's Approach Is Contrary to CAFA's Text and Purpose of Protecting Absent Class Members' Due Process Rights

CAFA was principally directed at ensuring that absent class members' due process rights were protected against the tactics of class action plaintiffs' attorneys who do not truly represent their interests. It should be interpreted, consistent with its plain meaning, to further that aim. By contrast, the Eighth Circuit's approach, as applied in this case, establishes a loophole for plaintiffs' attorneys seeking to return to the pre-CAFA status quo.

Prior to CAFA, in the absence of federal court oversight, class action litigation had evolved into an abusive instrument primarily used in product liability and mass tort cases to reward plaintiffs' lawyers. John Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370, 371-72 (2000) ("[W]here the plaintiffs' attorney was once seen as a public-regarding private attorney general, increasingly the more standard depiction is as a profit-seeking entrepreneur, capable of opportunistic actions and often willing to subordinate the interests of class members to the attorney's own economic self interest."). Plaintiffs' attorneys learned they could "game the system" by focusing their litigation efforts on certain favorable state-court venues through a method of forum-shopping designed to avoid federal court rooms in favor of more lenient county courthouses,

including "magnet" jurisdictions. S. Rep. No. 109-14, at 10 (2005).

Not surprisingly, abuses occurred "when state courts [were] asked to adjudicate complex and high-stakes cases involving interstate claims." Victor E. Schwartz, Mark A. Behrens, Leah Lorber, *Federal Courts Should Decide Interstate Class Actions: A Call For Federal Class Action Diversity Jurisdiction Reform*, 37 Harv. J. Legis. 483, 510 (2000). Plaintiffs' attorneys identified hot spots of local bias, or magnet venues, for bringing class actions, notwithstanding that the magnet jurisdictions had little or no connection to the underlying disputes or interstate policy.[3] Instead of complex litigation involving important interstate issues taking place in federal court, national policy debates unfolded on the steps of state

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[3] Madison County, Illinois, for instance, surged to the top of the list of magnet jurisdictions. The 725-square mile county in a rural southwest corner of the state transformed almost overnight into a class action boomtown. In 1998, Madison County was the site of two class action filings, both of which certified nationwide classes. John Beisner, Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . In State Court*, 25 Harv. J. L. & Pub. Pol'y at 169. Within two years, plaintiffs' attorneys had taken the hint and Madison County received 39 class action filings in 2000, 74 percent of which were filed on behalf of proposed nationwide classes. *Id.* Madison County, home to less than one percent of the U.S. population, became ground zero for national policy on important issues from car repairs to telecommunications to plumbing licensure. 151 Cong. Rec. H685, 686 (2005) (statement of Rep. Keller) ("[T]he movie 'Bridges of Madison County' was a love story. The 'Judges of Madison County' would be a horror flick.").

courthouses with no connection to the cases. *Beisner*, supra n.3, at 169.[4]

Through artful pleading to avoid removal to federal court, plaintiffs' attorneys increasingly sought preferred state-court venues to litigate their nationwide class claims, raising concerns of pervasive abuse and that claimants' rights were being ignored. *See Davis v. Cannon Chevrolet-Olds, Inc.*, 182 F.3d 792, 798 (11th Cir. 1999) (concurring with remand to state court even though "[p]laintiffs' attorneys are increasingly filing nationwide class actions in various state courts, carefully crafting the language in the petitions or complaints in order to avoid" removal to federal courts). Inside those magnet venues, abusive tactics persisted, and foremost among them was disregard for due process rights.[5] 151 Cong. Rec. S1157, 1172

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[4] The ill effects of state-court influence over national policy were illustrated in the Illinois case of *Avery v. State Farm Mut. Auto Ins. Co.*, 746 N.E.2d 1242 (Ill. App. 2001). In that case, the trial court purported to dictate insurance laws nationwide by holding that an insurer in a nationwide class action violated Illinois law with respect to replacement service parts even though other states' laws were in direct conflict with the holding. 151 Cong. Rec. S1157, 1172 (letter by Walter Dellinger); 151 Cong. Rec. H685, 687 (statement of Rep. Goodlatte) ("State Farm was put in a position of being in a court in Illinois in which they were going to have the decisions of the 50 State insurance commissioners, none of whom had any problem with this policy, overturned by one court judge who was not even experienced in terms of handling insurance policies[.]").

[5] Frequently during the era of magnet jurisdictions, state-court venues approached class certification with lax standards that reflected a laissez-faire attitude toward the due process

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(statement of Sen. Grassley) ("The magnet State courts . . . certify huge classes that involve claims that are completely dissimilar, to the detriment of both plaintiff and defendant. That ends up being a due process problem.").

While plaintiffs' attorneys greatly benefited by keeping their cases in state court, class members suffered. Plaintiffs' attorneys engaged in "claim shaving," which involved stipulations to waive claims – not unlike the damages stipulation in this case – thereby keeping complaints under the $75,000 damages threshold required for diversity jurisdiction, while extinguishing the claims of absent class members. *The Class Action Fairness Act of 1999: Hearing on S. 353 Before the Subcomm. on Adm. Oversight and the Courts of the S. Comm. on the Judiciary*, 106th Cong. (1999) ("Hearings on S. 353") (statement of Stephen G. Morrison) ("[I]t happens every day – class counsel sacrifice the claims of unnamed class members in order to keep their cases in state courts.").

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rights of not only out-of-state defendants but also unnamed class members. *Hearings on S. 353*, Prepared Statement of Stephen G. Morrison. Out-of-state defendants, for instance, suffered gross abuses known as "drive-by class certifications," in which judges certified claims for class treatment before defendants could even respond to certification motions. *Id.*; 151 Cong. Rec. H685, 689 (statement of Rep. Goodlatte) ("The existence of State courts that broadly apply class certification rules encourages plaintiffs to forum shop for the court that is most likely to certify a purported class.").

When plaintiffs either won or their attorneys settled for large settlements, the big pay day belonged to the attorneys while class members generally received little or nothing, often in the form of "promotional coupons to purchase more products from the defendants." S. Rep. No. 109-14, at 15; 151 Cong. Rec. H685, 690 (statement of Rep. Goodlatte) ("The loser in the system is the class member whose claim is extinguished by the settlement at the expense of counsel seeking to be the one entitled to recovery of fees.").

In general, CAFA sought to combat the proliferation of state court class action settlements with terms that primarily benefited plaintiffs' lawyers, at the expense of absent class members, and the lack of meaningful oversight or scrutiny of such settlements. It included express procedures to be followed by the federal courts in evaluating coupon settlements. 28 U.S.C. § 1712. It also included specific procedures requiring notice of a settlement to appropriate state and federal officials in order to ensure protection to absent class members' rights. 28 U.S.C. § 1715; S. Rep. No. 109-14, at 35 ("The Committee believes that notifying appropriate state and federal officials of proposed class action settlements will provide a check against inequitable settlements in these cases."); *id.* ("This provision is intended to combat the "clientless litigation" problem by adding a layer of independent oversight to prohibit inequitable settlements.").

More specifically, CAFA sought to protect absent class members, as well as defendants, by putting an

end to forum shopping. *See* John Massaro, *The Emerging Federal Class Action Brand*, 59 Clev. St. L. Rev. 645, 670 (2011). It did this by directly addressing the tactics that plaintiffs' attorneys had been using to avoid federal jurisdiction. *See* S. Rep. No. 109-14, at 27 (describing how CAFA "will make it harder for counsel to 'game the system.'"). In this way, suits seeking settlements of primary benefit to plaintiffs' attorneys could be channeled into federal court and dealt with appropriately. S. Rep. No. 109-14, at 4 ("To make matters worse, current law enables lawyers to "game" the procedural rules and keep nationwide or multi-state class actions in state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class member interest."); 151 Cong. Rec. H685, 686 (statement of Rep. Davis) ("This legislation will put an end to trial attorneys' forum shopping to find a friendly court where settlement awards will line their pocket while hitting victims and consumers in their pocketbooks.").

CAFA also expanded federal jurisdiction in the class action context, calling only for minimal diversity and an aggregate amount in controversy of more than $5,000,000. 28 U.S.C. § 1332(d)(6). The expansion of federal jurisdiction likewise was seen as a means of protecting absent class members:

> Arguments favoring such expansion focused on claims that many state courts were too willing to certify inappropriate, even frivolous, class actions, and then to approve settlements that were either forced on defendants

> in order to avoid litigation, or benefited the lawyers for the plaintiff class far more than the class members themselves, or both.

Richard Fallon, Jr., John Manning, Daniel Meltzer, David Shapiro, *Hart and Wechsler's The Federal Courts and The Federal System* 1368 (6th ed. 2009).

The text of the statute reflects Congress's intention that federal courts, in assessing jurisdiction, look beyond the artifices of pleading to consider the reality of proposed class actions. Rather than rely on named plaintiffs' representations as to the value of claims, the statute directs that "the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000." 28 U.S.C. § 1332(d)(6). In this way, the statute provides broad federal jurisdiction over class actions, including those that may be contrary to absent class members' interests and that could proceed only under the lax certification requirements prevailing in certain states.

This case demonstrates the risk to absent class members posed by misinterpretation of CAFA's jurisdictional provisions. The named plaintiff's efforts to remain in Arkansas state court through a stipulation of damages purportedly made on behalf of not only himself, but a class he does not represent and may never represent, directly undermines the rights of absent class members. Class certification may be easier to obtain in Arkansas state court because Arkansas does not apply the rigorous analysis of the

class certification criteria required by this Court. *See Simpson Housing Solutions, LLC v. Hernandez*, 347 S.W. 3d 1, 17 (Ark. 2009) ("[T]he federal courts apply a rigorous-analysis test for class actions, which this court has consistently rejected."). Nor does it allow any argument as to merits of the case, even when an understanding of the merits is critical to determining the propriety of class certification. *Id.* at 21.[6] Were the district court's remand order allowed to stand, there is a very real risk that absent class members will suffer the consequences.

IV. Post Hoc Notice and Other Actions Cannot Cure Due Process Violations Stemming From "Binding" Decisions Made Prior to Class Certification

The idea that a stipulation's impact on absent class members should be ignored in assessing federal jurisdiction because there *may* be an opportunity for an absent class member to opt out of the class or there *may* be a later decision on the adequacy of representation by a state court is out of step with the practical realities of class action litigation, antithetical to the principles underlying CAFA, and ultimately dismissive of absent class members' due process

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[6] That view of class certification is equally contrary to the view of this Court. *Shutts*, 472 U.S. at 811 ("[I]f the forum . . . wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection.").

rights. The assumption that a stipulation to forfeit class members' rights actually causes them no harm, because subsequent proceedings may cure any injury, is false. The possibility that a state court may eventually allow class members to opt out or may decide to deny class certification on adequacy grounds does nothing to prevent the abuses that CAFA was enacted to prevent – namely, lawyer-driven suits that place financial gain for lawyers over recovery for the class.

As an initial matter, when a named plaintiff and his counsel make what they deem to be a binding decision for a putative class before they have been appointed class counsel under Rule 23, they are acting without authority to do so. *See, e.g.*, *Smith*, 131 S.Ct. at 2279-80. That is a fundamental violation of the due process rights of absent class members that cannot be cured through an after-the-fact finding that the named plaintiff and counsel adequately represent the interests of the class or through a notice to the class that attempts to explain away how these class members' rights were violated. *Cf. id.* at 2280 ("Neither a proposed class action nor a rejected class action may bind nonparties."). *See also Richards*, 517 U.S. at 801 (citing *Hansberry*, 311 U.S. at 40; *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974); *Mullane*, 339 U.S. at 319).

The possibility that a state court may ultimately find the named plaintiff or his counsel *inadequate* provides no greater protection. For one thing, the possibility that the class representative or his counsel will ultimately be deemed inadequate should prevent

a conclusion that recovery above the stipulated amount is impossible to a legal certainty, because it means that another class member or lawyer who is not personally bound by the stipulation may later be appointed to represent the class. *See Back Doctors*, 637 F.3d at 830-31 ("A representative can't throw away what could be a major component of the class's recovery. Either a state or a federal judge might insist that some other person, more willing to seek punitive damages, take over as representative.").

In addition, permitting the infringement of class members' rights on the basis that a state court will eventually determine the adequacy of counsel is, as a practical matter, insufficient to protect absent class members' rights. Even if class certification is ultimately denied, as opposed to a substitute plaintiff or counsel being appointed as a representative, that could occur years after the decision on federal jurisdiction. At that point, any class members interested in pursuing class litigation would have to begin anew, assuming that their claims were not time-barred.

Nonetheless, some courts have permitted a named plaintiff and his counsel to make binding decisions for a class on the theory that once the class is certified and notice is sent, those absent class members who disagree with the named plaintiff's decisions can simply opt out of the class. *See, e.g.*, *Goodner v. Clayton Homes*, No. 4:12-cv-04001, 2012 WL 3961306, *5 (W.D. Ark. Sept. 10, 2012) ("If a forum-state class member doesn't like the stipulation, he must either opt-out or live with the stipulation. . . .

Members whose claims arise out of state presumably have the same two choices."); *Smith v. Am. Bankers Ins. Co.*, No. 2:11-cv-02113, 2011 WL 6090275, *8 (W.D. Ark. Dec. 7, 2011) ("[P]utative class members may simply opt out of the class and pursue their own remedies if they feel that the limitations placed on the class by Plaintiff are too restrictive."); *McClendon v. Chubb Corp.*, No. 2:11-cv-02034, 2011 WL 3555649, *5 (W.D. Ark. Aug. 11, 2011) ("Any arguments Defendants may have as to the named Plaintiffs' adequacy as class representatives may be addressed after remand. Furthermore, class members who do not agree with the way Plaintiffs have structured their claims are free to opt out of this action and bring their own suit structured in the manner they see fit."); *Tuberville v. New Balance Ath. Shoe, Inc.*, No. 1:11-cv-01016, 2011 WL 1527716, *4 (W.D. Ark. Apr. 21, 2011) ("[I]t is important to keep in mind that the Plaintiff in the case at bar has not yet been named class representative, nor has the class been certified by any court. It also follows that putative class members could simply opt out of the class and pursue their own remedies. . . .").

Other courts have found it sufficient that the state court, on remand, may consider the effect of a damages-limiting stipulation on class members when assessing the adequacy of counsel or the class representative. *Murphy v. Reebok Int'l, Ltd.*, No. 4:11-cv-214-DPM, 2011 WL 1559234, *3 (E.D. Ark. Apr. 22, 2011) ("Reebok's attack on the stipulations goes more to Murphy's adequacy as a class representative and

counsel's adequacy as class counsel than to good faith. These issues can be addressed after remand."); *Thomas v. Countrywide Home Loans*, No. 3:11-cv-399-WKW, 2012 WL 527482, at *4 n.4 (M.D. Ala. Feb. 17, 2012) ("[S]uch a restriction might be a reason to deny class certification; in other words, the state court could conclude, after remand, that Hall is not an adequate class representative. This court should not, however, force a plaintiff to seek more money than she wants.") (quoting *Hall v. ITT Financial Services*, 891 F. Supp. 580, 582 (M.D. Ala. 1994)).

But due process requires more than an uncertain possibility of relief years in the future, particularly when absent class members may face the risk of losing their claims altogether. If a stipulation is effective, after all, its effect may be to "throw away what could be a major component of the class's recovery." *Back Doctors Ltd.*, 637 F.3d at 830-31. *See also Manguno*, 276 F.3d at 723-24 ("[I]t is improbable that [the named plaintiff] can ethically unilaterally waive the rights of the putative class members to attorney's fees without their authorization."). Or a stipulation may winding up costing the class money, in the form of attorneys' fees. *See Bass v. Carmax Auto Superstores, Inc.*, No. 07-0883-cv-W-ODS, 2008 WL 441962, at *2 (W.D. Mo. Feb. 14, 2008). In such circumstances, post hoc "cures" may not provide absent class members relief.

CONCLUSION

Permitting plaintiffs' attorneys to artificially limit the amount of damages sought on behalf of a putative class, prior to certification or any evaluation of the adequacy of representation, violates the due process rights of absent class members and undermines Congress's attempt to protect those rights against unscrupulous legal tactics. *Amicus* therefore urges this Court to hold that such stipulations can have no bearing on federal jurisdiction under CAFA. This Court should reverse the district court's order remanding this case to Arkansas state court.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 11-1450

FILED
OCT 29 2012
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

THE STANDARD FIRE INSURANCE COMPANY,
Petitioner,

v.

GREG KNOWLES, INDIVIDUALLY AND AS CLASS REPRESENTATIVE ON BEHALF OF ALL SIMILARLY SITUATED PERSONS WITHIN THE STATE OF ARKANSAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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Center for Class Action Fairness (the "Center"), by and through the undersigned counsel, by consent of the parties, submits this brief *amicus curiae* in support of Petitioner respectfully praying that the Court reverse the lower court's holding that a putative class-action plaintiff may disclaim damages in excess of $5 million solely to avoid federal jurisdiction under the Class Action Fairness Act, Pub. L. No. 109-2, 119 Stat. 4 ("CAFA").* In support of Petitioner, the Center states as follows:

Interest of the Amicus

The Center is a non-profit organization; its attorneys represent consumers *pro bono* in class action litigation across the United States by, among other things, objecting to unfair class action settlements on their behalf. The Center's attorneys' litigation on behalf of consumers has been covered by the *Wall Street Journal*, *Forbes*, the *National Law Journal*, and the *ABA Journal*, among others. Unlike so-called "professional objectors" that threaten to disrupt a settlement in order to extract a share of plaintiffs' attorneys' fees, the Center makes no effort to engage in *quid pro quo* settlements for profit. *See* Paul Karlsgodt & Raj Chohan, *Class Action Settlement Objectors: Minor Nuisance or Serious Threat to Approval*, BNA: Class Action Lit. Report, Aug. 12, 2011 (distinguishing Center from for-profit "professional objectors"). Instead, the

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* Pursuant to Sup. Ct. R. 37.6, the Center certifies that no counsel for either party authored any part of this brief and that no person, other than the *amicus* and its counsel, made a monetary contribution intended to fund the preparation of the brief.

Center represents consumers by objecting to unfair settlements that do not provide meaningful relief to class members and by seeking court rulings that protect consumers from self-serving class action attorneys, in the process winning millions of dollars for class members. *E.g.*, *In re Classmates.com Consolidated Litig.*, No. 2:09-cv-00104-RAJ, slip op. at 16 (W.D. Wash. Jun. 15, 2012) (slip op.) (noting Center "was relentless in [its] identification of the numerous ways in which the proposed settlements would have rewarded class counsel (and a *cy pres* charity) at the expense of class members" and "significantly influenced the court's decision to reject the first settlement and to insist on improvements to the second").

The Center's work also makes it especially familiar with cases where putative class attorneys looking out for their own interests abuse the class action process at the expense of absent class members. The unfair settlements the Center has fought are not isolated cases: indeed, economic theory, experience, and Congressional findings all indicate that a significant number of class actions leave consumers without meaningful relief.

SUMMARY OF THE ARGUMENT

The Class Action Fairness Act ("CAFA") expanded federal jurisdiction over national class actions to ensure that out-of-state absent class members would be treated fairly given the "abuses" that were taking place in state court. Among those abuses was the structuring of settlements to ensure that the lion's share of the value of the defendant's payment would be realized by attorneys, rather than class members. Attorneys now seek to evade federal scrutiny of such self-dealing settlements by having putative class representatives disclaim intent to seek above the CAFA jurisdictional limits. But such abusive forum-shopping tactics both contradict this Court's precedents and demonstrate a fundamental failing of the Rule 23(a)(4) adequacy-of-representation requirement.

Just last year, this Court held that "[n]either a proposed class action nor a rejected class action may bind nonparties." *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2380 (2011). Yet, the district court and the Eighth Circuit Court of Appeals each allowed the named plaintiff here to do just that, specifically, to disclaim aggregate damages above $5 million, despite evidence that the class damages exceeded that amount. The decisions of the courts below are contrary to *Smith* and directly undermine the policy objectives of both Rule 23 and CAFA.

In class action litigation, the named class representative is a placeholder plaintiff for a putative class of individuals harmed by a defendant's alleged acts. During the certification process, a court adjudicates whether the named class member truly represents other members of the

hoped-for class. Before certification, the named representative has a right to the adjudication of only his or her individual claim against the defendant.

The district court's central mistake in this case was in granting the named class plaintiff unfettered authority to limit the recovery of absent non-parties, when the defendant presented evidence that the recovery, if the liability claims were proven, would likely be greater than $5 million. Alternatively and additionally, the district court erred in assuming, without investigation, that counsel for the putative class had a good-faith reason to disclaim damages and bind absent class members solely to avoid federal jurisdiction under CAFA.

These mistakes ignore Congress's intent that CAFA should expand the scope of federal jurisdiction over class actions. And most importantly, they permit class action counsel to take advantage of state-court systems that lack the resources, the authority, or the inclination to ensure that class members are treated fairly.

A federal system that allows state courts to approve class action settlements that prejudice the rights of absent or out-of-state class members is inherently unstable, and provided much of the warrant for Congress to enact CAFA in the first place. This case presents a critical opportunity for this Court to curtail the slippage back to abusive pre-CAFA practice, and enforce Congress's intent that federal courts should resolve important class action cases.

ARGUMENT

In the case below, initially filed in state court in Arkansas, the named plaintiff, Greg Knowles, alleged that he represented a class of "hundreds, and possibly thousands," of individuals allegedly injured by the Defendant's failure to pay certain charges pursuant to its homeowners insurance policies. Pet. App. 66a. Mr. Knowles alleged that "the total aggregate damages of the Plaintiff and all Class Members, inclusive of costs and attorneys' fees, are less than five million dollars ($5,000,000), and the Plaintiff and Class stipulate they will seek to recover total aggregate damages of less than five million dollars ($5,000,000)." *Id.* at 72a. Attached to the Complaint was a "Sworn and Binding Stipulation" Mr. Knowles had executed, affirming that he would not "*seek damages for the class* as alleged in the complaint to which this stipulation is attached in excess of $5,000,000 in the aggregate (inclusive of costs and attorneys' fees)." *Id.* at 75a (emphasis added).

In the Eighth Circuit as in other circuits, a defendant seeking removal of a class action under CAFA must show by a preponderance of evidence that the amount in controversy, in the aggregate, exceeds $5 million. In the district court's judgment, the Defendant here made that showing. Thus, pursuant to the circuit's precedents, the burden shifted to Mr. Knowles to establish "that it is legally impossible to recover in excess of the jurisdictional minimum." *Bell v. Hershey Co.*, 557 F.3d 953, 959 (8th Cir. 2009).

The district court concluded that Mr. Knowles' stipulation proved to a "legal certainty that his claim

falls under the $5 million threshold for remand to state court." Pet. App. 9a. It supported this conclusion on its understanding that (1) circuit precedent required it to resolve any ambiguities about federal jurisdiction in favor of remand, and (2) if made in apparent good faith, a plaintiff may defeat removal by suing for less than the jurisdictional amount, though he would be justly entitled to more. *See Transit Casualty Co. v. Certain Underwriters at Lloyd's of London*, 119 F.3d 619, 625 (8th Cir. 1997); *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938). In making this ruling, the district court noted that because absent class members have a right under state law to opt out of any class, once certified, they were not prejudiced by the limitations Mr. Knowles and his counsel placed on class recovery. Pet. App. 8a.

The district court's conclusions below rely on Mr. Knowles and his counsel having authority to bind persons with claims ostensibly similar to Mr. Knowles' to a limited recovery long before any court certifies the case as a class action. The court therefore endorsed the view that Mr. Knowles and his counsel may elect themselves as "representatives" of individual non-parties with the power to decide where to sue and how much to accept in damages. This conclusion stands in direct contravention to this Court's holdings.

Additionally, while the district court made passing reference to the requirement that an individual plaintiff must show that he is restricting his damages to avoid federal removal "in good faith," the court did not require plaintiff to provide any good-faith reason for deliberately evading removal. Rather, it tacitly considered the mere desire to avoid

federal jurisdiction as good enough reason for Mr. Knowles to cut off his and his fellow potential class-members' future recovery.

The Eighth Circuit denied permission to appeal. Pet. App. 1a. This ruling was likewise error. If the case were permitted to proceed in state court, it would likely result in a settlement that will be very profitable for putative class counsel, but will provide little benefit to the putative class members.

I. MANY STATE COURTS DO NOT OFFER THE SAME PROTECTIONS TO ABSENT CLASS MEMBERS AS FEDERAL COURTS.

The primary purpose of class action litigation is to provide compensation to injured class members. *See* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.04, comment d (2010) ("PRINCIPLES") ("Various doctrines imply that the primary objective of aggregate litigation must be to benefit claimants."). And Rule 23 exists in part to protect the due process rights of those class members who never appear before the court. *See AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1751 (2011). Nevertheless, courts, legislators, and scholars have long worried that class actions have the potential to benefit class counsel at the expense of the absent class members. *See, e.g., Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004) (Posner, J.); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 796-97 (3d Cir. 1995); John C. Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1347-48 (1995) (discussing agency problem in class action settlements).

As a direct result of these concerns, Congress passed CAFA to "assure fair and prompt recoveries for class members with legitimate claims," to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction," and prevent "abuses of the class action device that have harmed class members." 28 U.S.C. § 1711 note §§ 2(a)(2)(A), (b)(1), (b)(2). In particular, Congress found that "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed, such as where counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value." 28 U.S.C. § 1711 note §§ 2(a)(3), (a)(3)(A). Thus, several sections of CAFA contain provisions specifically aimed at reducing various settlement abuses that had resulted in profits for class-action attorneys at the expense of the absent class members. *See* 28 U.S.C. §§ 1712 (requiring coupon settlements to be valued at value of redeemed coupons, rather than their face value), 1713 (prohibiting "negative value" settlements where absent class members must pay attorneys), 1714 (prohibiting settlements that discriminate in favor of class members located closer to the court), 1715 (requiring notice of settlements to appropriate government authorities). Moreover, federal courts subject these settlements to higher scrutiny because of the potential for abuse by counsel. *See, e.g., Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 654 (7th Cir. 2006) ("CAFA required heightened judicial scrutiny of coupon-based settlements"). Even beyond settlements explicitly covered by CAFA, federal

courts generally provide heightened scrutiny of settlements, especially pre-certification settlements. *Id.* (applying heightened scrutiny to pre-CAFA settlement); *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011).

This Court has recognized that, given the opportunity, class-action lawyers will engage in forum-shopping. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1447-48 (2010); *see generally* John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . in State Court,* 25 HARV. J.L. & PUB. POL'Y 143 (2001) (discussing problem of abusive anomalous "magnet" courts that "exercise a widely disproportionate role in adjudicating national disputes"); *see also* Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U PENN. L. REV. 1649, 1660–66 (2008) (discussing how CAFA partially solves the problem of the anomalous court "by trusting federal courts to police the legitimacy of class counsel's representation of the absent class members"). It would make little sense to interpret one provision of CAFA (the $5 million amount-in-controversy provision) in such a way as to undermine the remainder of the statute simply by the fiat of a putative class counsel.

And, as the case below demonstrates, lawyers will be attracted to jurisdictions that do not afford the same protections for absent class members, because those jurisdictions impose fewer barriers to certification and settlement of a class action. Indeed, Miller County, Arkansas, the state court venue for this class action below, has been home to at least 26 class action settlements worth more than $175 million in fees to class counsel, since 2004. *See*

Alison Frankel, *Are class action lawyers in Arkansas snubbing SCOTUS (and CAFA)?*, Thomson , available at http://newsandinsight.thomsonreuters.com /Legal/News/2012/10_-_October/Are_class_action_lawyers_in_Arkansas_snubbing_SCOTUS_(and_CAFA)_/, last viewed Oct. 20, 2012. Despite the state-only nature of the claims in these cases, many of the settlements were nationwide in scope. *Id.*

Such forum-shopping is not unique to Arkansas, and class action attorneys engage in it to evade scrutiny not just of class certification decisions, but class settlement decisions. For example, after a federal court rejected an unfair coupon settlement on behalf of a putative class of Honda Civic Hybrid owners, class attorneys simply used the vehicle of a supposed state-only class action to create a nationwide class-action settlement under more attorney-friendly California state law and avoid CAFA scrutiny. *Compare True v. American Honda Motor Co.*, 749 F. Supp. 2d 1052 (2010) (rejecting coupon settlement that would pay attorneys $2.95 million) *with Lockabey v. American Honda Motor Co.*, No. 37-20 1 0-00087755-CU-BT-CTL (Cal. Superior Ct., San Diego Cty., Mar. 16, 2012) (applying California law to approve materially similar nationwide coupon settlement that would pay attorneys $8.474 million and settle *True* complaint).

The ability of class counsel to extract fees in a state-court settlement of a national class action several times what federal courts would consider reasonable invariably comes at the expense of absent class members. A "defendant is interested only in disposing of the total claim asserted against it" rather than who gets the money. *Bluetooth*, 654 F.3d

at 949 (internal quotations and citations omitted). Thus every dollar that goes to fees (or can be anticipated as going to fees) above what a federal court would consider reasonable will effectively come out of the pocket of the class, even when the parties engage in the economic fiction that fees come from a separate fund. *Johnston v. Comerica*, 83 F.3d 241 (8th Cir. 1996) ("[I]n essence the entire settlement amount comes from the same source. The award to the class and the agreement on attorney fees represent a package deal."); *accord GMC Pick-Up*, 55 F.3d at 820. "If fees are unreasonably high, the likelihood is that the defendant obtained an economically beneficial concession with regard to the merits provisions, in the form of lower monetary payments to class members or less injunctive relief for the class than could otherwise have obtained." *Bluetooth*, 654 F.3d at 947; *accord* John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 883 (1987) ("The classic agency cost problem in class actions involves the 'sweetheart' settlement, in which the plaintiff's attorney trades a high fee award for a low recovery.").

If the practice of using binding stipulations to avoid removal under CAFA continues, class action attorneys will continue to lodge cases in state-court venues that lack the protections federal courts offer absent class members. While it is difficult to get reliable data on class action settlements in state court, several publicized cases have shown just how difficult it can be to protect the rights of absent class members in these venues. Each of the following coupon settlements, for example, was approved *after*

the passage of the CAFA, and each runs counter to the express intentions of federal class action policy as expressed in Rule 23 and CAFA.

- In May 2010, the City of St. Louis Circuit Court in Missouri approved a classwide settlement against A.G. Edwards. The millions of class members received less than $6 million in cash, and another $34 million in face value of coupons (issued at one $8.22 coupon per class member per year for three years, with heavy restrictions on their use). The lawyers, on the other hand, received an award of $21.6 million. Though the Missouri Court of Appeals purports to follow federal class-action law, it affirmed the settlement approval without addressing objections that coupons should be valued at their redemption rate rather than their face value, as done in federal court. *Bachman v. A.G. Edwards*, 344 S.W.3d 260 (Ct. App. Mo. 2011); *see also* Dan Fisher, *St. Louis Judge Hands Lawyers $21 Million For Coupons*, Forbes.com, Jun. 23, 2010. Given that the typical redemption rate for coupons is between 1% and 3% (see James Tharn & Brian Blockovich, Coupons and the Class Action Fairness Act, 18 Geo. J. Legal Ethics 1443 (2005)), the value of the relief to the class was likely less than $10 million, less than half the double-lodestar the attorneys received.

- In 2010, a California Court of Appeals affirmed a classwide settlement between retailer Nordstrom and its sales associates that included a $2.5 million "merchandise voucher" component. It reasoned in part that California courts do not disfavor coupon settlements. *Nordstrom Com'n*

Cases, 186 Cal. App. 4th 576, 591, 112 Cal. Rptr. 3d 27, 38 (2010).

- Similarly, in 2008, a California Court of Appeal affirmed—over objection—a class action settlement against Netflix, in which class members received a free upgrade of their Netflix service for a month (or a free month of service if they were no longer subscribers), and class counsel received more than $2 million in fees and expenses. *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 48-50 (2008). In doing so, the court specifically dismissed an objector's argument that CAFA evidenced a justifiable skepticism of coupon settlements. *Id.* at 54.

- In 2008, the Cleveland County District Court in Oklahoma approved a class-action settlement against Compaq that provided a coupon towards the purchase of a new Compaq computer or a 256 MB flash drive to class members, and $40 million in fees to the class counsel, again valuing the coupons at face value rather than their likely small redemption rate. *See* Tom Blakely, *Local court OKs $640M class settlement in computer lawsuit,* The Norman Transcript, May 15, 2008, available at http://normantranscript.com/local/x519016885/Local-court-OKs-640M-class-settlement-in-computer-lawsuit, last viewed Oct. 14, 2012.

Each of these state-court settlements of national claims offered little benefit to the absent class members (why, for example, would someone who lost data on a Compaq computer wish to buy another one?), while providing the lion's share of settlement value, millions of dollars, in fees to their attorneys.

These are exactly the kinds of settlements that Congress—through CAFA—sought to prevent. Had these settlements been negotiated in federal court, CAFA scrutiny would have been substantially more likely to prevent class counsel from receiving a disproportionate share of the settlement value at the expense of their putative clients.

State courts also often provide less protection to absent class members than federal courts do in other aspects of class action settlement review. For example, federal courts regularly scrutinize the *cy pres* provisions of settlements to ensure that they avoid conflicts of interest and that money is going to class members before it goes to third parties. *See, e.g., Dennis v. Kellogg*, No. 11-55674, 2012 U.S. App. LEXIS 18576 (9th Cir. Sep. 4, 2012); *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468 (5th Cir. 2011); *see generally Nachshin v. AOL, Inc.*, 663 F.3d 1034, 1038-39 (9th Cir. 2011) (discussing "nascent dangers to the fairness of the distribution process" of unbridled *cy pres*) (citing authorities). But state courts have signed off on diversion of settlement funds from class members to the judiciary. For example,

- An Ohio state court approved a *cy pres* distribution of over $450,000 from a settlement fund to buy "historically appropriate" furniture and accessories for the courthouse in which the presiding judge sat. *See* Cy Pres Donation for Geauga County Courthouse, http://www.ohiolawyersgiveback.org/charities/geauga_courthouse.asp (last visited Oct. 25, 2010).

- A West Virginia state court approved a *cy pres* distribution of $8 million to the presiding judge's

alma mater law school instead of ensuring that the money went to the putative class beneficiaries. Andrew Clevenger, *WVU Receives $8M Gift; Money Is Left Over From Class-Action Against H&R Block*, CHARLESTON GAZETTE, May 3, 2008, at 1A.

In short, allowing attorneys to evade CAFA by disclaiming relief on behalf of class members they do not yet represent would undermine the express purpose of Rule 23 and of CAFA, and result in a wealth transfer from nationwide class members to class counsel.

II. THE NAMED PLAINTIFF OF A PROPOSED CLASS LACKS THE POWER TO BIND ABSENT CLASS MEMBERS TO A RESTRICTED RECOVERY, AND ONE WHO DOES SO TO FAVOR CLASS COUNSEL OVER THE CLASS LACKS ADEQUACY.

Until a court certifies a class, the named plaintiff does not represent any absent class members. *Smith*, 131 S. Ct. at 2381 ("a properly conducted class action, with binding effect on nonparties, can come about in federal courts in just one way—through the procedure set out in Rule 23") (internal quotation omitted). Instead, the named plaintiff of a proposed class action is prosecuting only his individual claims.

The idea that a plaintiff bringing a putative class action can unilaterally decide to restrict the amount in controversy is founded in two errors: (1) an ignorance of this Court's holding in *Smith*, and (2) a misapplication of this Court's well-known phrase from *St. Paul Mercury Indemnity Co. v. Red*

Cab Co., that "unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith." 303 U.S. at 294. This concept is inapplicable in the context of a putative class action because the named representative is not the complaint's master until a state or federal court determines that he deserves to be in that role.

The two circuit courts of appeal that had previously denied putative class representatives the right to restrict the damages of the future class did so even before this Court's holding in *Smith*. The Fifth Circuit Court of Appeal, in *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720 (5th Cir. 2002), asserted that it was "improbable that Manguno can ethically unilaterally waive the rights of the putative class members to attorney's fees without their authorization." *Id.* at 724. The Seventh Circuit Court of Appeal, in *Back Doctors Ltd. v. Metropolitan Prop. & Cas. Ins. Co.*, 637 F.3d 827 (7th Cir. 2011) reached a similar conclusion on slightly different grounds, ruling that because the named plaintiff had a "fiduciary duty" to other members of the putative class, it could not "throw away what could be a major component of the class's recovery." *Id.* at 830-31.

Each of these courts zeroed in on the same concern: a class representative who is willing to jettison relief to which the class was entitled for his (or his lawyers') personal benefit cannot adequately represent that class. Indeed, this is why the certification process contains an inquiry into adequacy, because *before* the named plaintiff may bind absent class members, the court must ascertain that he will serve as a faithful fiduciary to the class.

Hansberry v. Lee, 311 U.S. 32, 42-43 (1940) ("members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present"); *Concepcion*, 131 S. Ct. at 1751 ("For a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members"); *see also* PRINCIPLES §1.05 comment c ("The requirement of adequate representation is a creature of due process that exists in class actions and other representational lawsuits where parties stand in judgment on behalf of others."). By summarily accepting the disclaimer of damages at the remand stage, however, the courts below prevented the very adequacy inquiry that would have revealed Mr. Knowles' conflict of interest, and thus denied the absent class members the due process protections provided by CAFA and Rule 23.

The right of opt out is not enough to protect class members from such abusive practices in the typical consumer class action. The point of a class action is to aggregate claims that cannot be vindicated individually. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997). Opt-outs are valuable rights in cases where an individual has a sizable claim, like a large shareholder in a securities class action, or where a defendant offers an arbitration process that protects the ability of a plaintiff to bring low-value claims. *Cf. Concepcion*, 131 S.Ct. at 1751. But an opt-out in a consumer class action settlement where, as is typical, the defendant denies liability while waiving the class's claims is all but worthless. The individual class member opting out has no chance of prosecuting the case

individually: "Economic reality dictates that petitioner's suit proceed as a class action or not at all." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974). Courts cannot rely on the opt-out right to cure class action settlement abuses in a case with claims of this size.

As discussed in Section I above, one major reason for such forum shopping is the fact that many state courts are willing to award a disproportionate share of the settlement recovery to the attorneys, rather than the class, permitting class counsel to engage in self-dealing without federal scrutiny. In other circumstances, courts have held that the willingness of the class representative to put the interests of class counsel ahead of the class precludes a finding of adequacy. *In re Aqua Dots Prod. Liab. Litig.*, 654 F.3d 748, 752 (7th Cir. 2011) (Easterbrook, J.); *cf. also Robert F. Booth Trust v. Crowley*, 687 F.3d 314 (7th Cir. 2012) (Rule 23.1). While the Court need not reach this issue here, the Center suggests that any class representative that would put the interests of class counsel's hope for a disproportionate fee ahead of the maximum recovery for the class *per se* flunks the Rule 23(a)(4) adequacy test. *Cf. Back Doctors Ltd. v. Metropolitan Property*, 637 F.3d 827, 830 (7th Cir. 2011) (noting that class representative's willingness to breach fiduciary duty to class by waiving valuable rights may result in replacement of class representative at future juncture).

CONCLUSION

For these reasons, your *amicus* respectfully urges the Court to reverse the lower court's holding that a class-action plaintiff may disclaim damages in excess of $5 million to avoid federal jurisdiction under CAFA.

RESPECTFULLY SUBMITTED,

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
OCT 29 2012
OFFICE OF THE CLERK

No. 11-1450

IN THE

Supreme Court of the United States

THE STANDARD FIRE INSURANCE COMPANY,
Petitioner,

v.

GREG KNOWLES, INDIVIDUALLY AND AS CLASS REPRESENTATIVE ON BEHALF OF ALL SIMILARLY SITUATED PERSONS WITHIN THE STATE OF ARKANSAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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QUESTION PRESENTED

Whether a class action that is removed under the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4, may be remanded solely on the ground that a would-be named plaintiff purports to waive any recovery for the class above CAFA's $5 million jurisdictional threshold.

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IN THE

Supreme Court of the United States

No. 11-1450

THE STANDARD FIRE INSURANCE COMPANY,
Petitioner,

v.

GREG KNOWLES, INDIVIDUALLY AND AS CLASS REPRESENTATIVE ON BEHALF OF ALL SIMILARLY SITUATED PERSONS WITHIN THE STATE OF ARKANSAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE RETAIL LITIGATION CENTER, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation.[1] The Chamber directly represents 300,000

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel

members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber represents the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the Nation's business community.

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and engages in legal proceedings that affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases.

This case presents a question of vital importance to *amici*'s members: Whether a putative class representative may evade the protections of the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, § 4, 119 Stat. 4, 9-12—a law intended to guarantee a federal forum for significant class actions—by offering a stipulation purportedly waiving, for himself and absent class members, any recovery above CAFA's $5 million jurisdictional threshold. Many of *amici*'s members have first-hand experience with state-court systems that refuse to subject proposed classes to anything like the meaningful

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made a monetary contribution intended to fund this brief's preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

scrutiny required under Federal Rule of Civil Procedure 23, and which permit abusive and costly discovery tactics and other procedural devices that force defendants to settle meritless claims. Because there is no vehicle that allows for the consolidation of related class actions in different States' courts (as exists, for example, under the federal multi-district litigation statute, see 28 U.S.C. §1407(a)), many of *amici*'s members have also been forced to shoulder the burden of simultaneously defending against a litany of overlapping class actions in state courts throughout the Nation.

Amici have advocated strongly against abusive state class-action procedures. The Chamber, for example, was an early and vocal supporter of CAFA's enactment, and the Chamber has filed briefs on CAFA issues in this and other courts seeking to fulfill CAFA's guarantee of a federal forum for important class actions—including a brief urging the Court to grant the petition for a writ of certiorari in this case. *E.g.*, *Knowles* v. *Standard Fire Ins. Co.*, No. 11-1450, cert. granted, 81 U.S.L.W. 3031 (Aug. 31, 2012); *Skechers U.S.A., Inc.* v. *Tomlinson*, No. 11-287, cert. denied, 132 S. Ct. 551 (2011); *Gay* v. *Morgan*, No. 06-1471, cert. denied, 552 U.S. 940 (2007); *Cappuccitti* v. *DirecTV, Inc.*, No. 09-14107 (11th Cir. 2010), reh'g granted, 623 F.3d 1118 (11th Cir. 2010). *Amici* and their members thus have both a unique perspective on the question presented and a substantial interest in ensuring that CAFA's requirements are interpreted and enforced consistent with its purpose.

SUMMARY OF ARGUMENT

I. CAFA was enacted to combat widespread "abuses of the class action device" in state courts—abuses that harmed class members and defendants, damaged interstate commerce, and undermined respect for the judicial

system. Pub. L. No. 109-2, §2(a)(2), (4)(C), 119 Stat. 4, 4-5.

A. Before CAFA, class-action plaintiffs regularly flocked to a small number of so-called "magnet" jurisdictions—state courts that, among other practices, often certified classes with little scrutiny. Those (and other) state courts were also often ill-equipped to handle large and complicated class-action suits, particularly when those suits required application of different States' laws.

B. To remedy those systemic defects, CAFA expanded federal diversity jurisdiction, allowing a purported class action to be removed to federal court whenever more than $5 million is at issue and minimal diversity exists. Congress made clear that it intended the statute's removal provisions to be read broadly in favor of a federal forum.

C. Under the decision below and similar Eighth Circuit precedent, putative lead plaintiffs and their counsel can evade CAFA's protections and defeat federal jurisdiction by signing a stipulation purporting to promise, on behalf of absent class members, that the class will seek less than $5 million. That rule is inconsistent with CAFA's purposes: It undermines CAFA's goal of federal supervision of class actions; strips absent class members of the federal protections Congress intended to provide them; and encourages the magnet jurisdictions Congress meant to curtail.

II. The rule adopted below is also inconsistent with this Court's long-held requirement that federal diversity jurisdiction can be defeated, and remand to state court permitted, only if the plaintiff can show to a "legal certainty" that the threshold federal jurisdictional amount will not be met. As a legal matter, stipulations of the sort at issue here cannot provide the legal certainty ordinarily

required. And practical experience confirms that such stipulations will not effectively limit the amount at issue.

A. In *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 292 (1938), this Court held that a party seeking remand to state court on the basis of a jurisdictional amount-in-controversy requirement must show, to a "legal certainty," that the threshold jurisdictional amount will not be met. This Court announced the "legal certainty" requirement in a case where Congress had sought to *limit* federal court jurisdiction. *Id.* at 288. "Legal certainty" thus is the *minimum* standard that should apply under CAFA, which seeks to *expand* federal court jurisdiction. Any lesser standard would encourage the abusive forum-shopping CAFA was meant to prevent. As petitioner notes, the text of CAFA may preclude such stipulations from being considered at all. Pet Br. 11. At the very least, however, defendants are entitled to insist on proof to a legal certainty that the stipulation in fact will preclude any recovery of more than $5 million.

B. The damages stipulations at issue here cannot satisfy *St. Paul Mercury*'s legal certainty standard. As this Court explained in *Smith* v. *Bayer Corp.*, 131 S. Ct. 2368 (2011), a would-be lead plaintiff has no authority to bind absent class members until he is appointed the representative of a certified class. It is thus impossible to conclude with legal certainty at the time of removal—*before* any class has been certified, and *before* the proposed named plaintiff's adequacy has been tested—that a stipulation will bind any future class. Even if a class ultimately is certified, moreover, absent class members may be expected to challenge the stipulation on due process grounds. In any event, the stipulation at issue here, by its own terms, cannot supply the requisite legal certainty:

Among other problems, an ambiguous statement by a would-be lead plaintiff that he will not "seek" damages for the class above the jurisdictional threshold does not preclude him from *accepting* a larger amount in settlement.

C. Experience has shown, moreover, that damages stipulations will not actually limit the amount in controversy. Before CAFA was enacted, lead plaintiffs and class counsel (including respondent's counsel below) often "stipulated" to limit the named plaintiff's requests for recovery below the $75,000 jurisdictional threshold for removal to federal court. Afterward, however, they used aggressive discovery tactics, permitted by state courts, to obtain substantial settlements and attorney's fee awards. That pattern has continued since CAFA's enactment. In practice, stipulated limitations on the damages sought are illusory.

III. The use of damages stipulations to defeat federal jurisdiction harms judicial economy and sound class-action policy.

A. Allowing damages stipulations to defeat removal under CAFA frustrates the ability of class-action plaintiffs and defendants to achieve a global resolution of the underlying controversy. Uncertainty regarding a stipulation's binding power invites collateral attacks upon any class-action judgment or settlement. Damages stipulations also encourage disaffected class members to opt out of the class, fomenting inefficient "splinter litigation." And such stipulations make it even more difficult to settle class actions affecting citizens of multiple States because, unlike in federal practice, States lack procedures for even marginal coordination and consolidation of overlapping lawsuits in different States' courts.

B. Finally, damages stipulations are at odds with Congress's efforts to ensure that plaintiffs are properly represented and that defendants are afforded the procedural protections available in federal court. If such stipulations truly limited recovery, they would rarely be in the interest of absent class members, who may see their recoveries limited to a pittance without any of the procedural safeguards Congress sought to provide. The only persons who stand to benefit from damages stipulations are would-be lead plaintiffs and their counsel.

ARGUMENT

Congress enacted CAFA in response to widespread abuses in state-court class actions. See Pub. L. No. 109-2, §2(a)(2), 2(b), 119 Stat. 4, 4-5. Many of those abuses were concentrated in a few jurisdictions notoriously hostile to class-action defendants—including the Circuit Court of Miller County, Arkansas, the court to which respondent seeks remand. A key part of Congress's response was to expand federal diversity jurisdiction over class actions so that "interstate cases of national importance" could be handled by the federal courts. *Id.* §2(b)(2), 119 Stat. 4, 5.

The rule adopted by the Eighth Circuit and applied below effectively nullifies a key component of that effort. Under the Eighth Circuit's approach, cases that are otherwise properly removed under CAFA must be remanded to state court for failure to reach CAFA's amount-in-controversy requirement whenever the putative class representative purportedly promises not to seek more than $5 million on behalf of himself and the class. But cases should not be dismissed for failure to meet the amount-in-controversy requirement unless it is "legally certain" that sum cannot be met. A purported stipulation by a putative class representative like the one

at issue here cannot provide that legal certainty. As a legal matter, it is at least uncertain whether such stipulations are binding on the class. And as a practical matter, experience has proven that they will not actually limit the amount in controversy to $5 million. Ultimately, such stipulations ill serve the interests of judicial economy and disserve plaintiffs, defendants, and the public alike.

I. CAFA Is Intended Broadly To Encourage Removal To Federal Court

A. CAFA Was Enacted To Overcome Systemic Problems In State Class Actions

1. Before CAFA was enacted, class-action plaintiffs regularly flocked to a small number of "magnet" jurisdictions with little or no connection to the nationwide claims being asserted. See S. Rep. No. 109-14, at 13 (Feb. 28, 2005); see also 151 Cong. Rec. 1551-1552 (Feb. 7, 2005) (statement of Sen. Frist); 151 Cong. Rec. 2636 (Feb. 17, 2005) (statement of Rep. Sensenbrenner) (noting that "[a] major element of the worsening crisis is the exponential increase in State class action cases in a handful of 'magnet' or 'magic' jurisdictions"); 151 Cong. Rec. 2652 (Feb. 17, 2005) (statement of Rep. Shays) ("Attorneys are increasingly filing interstate class actions in State courts, mostly in what are known as 'magnet' jurisdictions.").[2] That trend has been documented in studies showing the "explosive" growth of class-action filings in "improbable" state jurisdictions. S. Rep. No. 109-14, at 13 & nn.41-42

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[2] See also 151 Cong. Rec. 2632 (Feb. 17, 2005) (statement of Rep. Barrett) ("[I]n the past few years, we have witnessed an explosion of interstate class actions being filed in State courts, particularly in certain 'magnet' jurisdictions."); 151 Cong. Rec. 2387 (Feb. 16, 2005) (statement of Rep. Capito) (abusive practices "take advantage of class action law by shopping for venues where they can find sympathetic juries and judges").

(collecting studies); see also 151 Cong. Rec. 2660 (Feb. 17, 2005) (statement of Rep. Smith) (describing "forum shopping" as "one of the worst problems in class actions today"). While federal court class-action filings rose 300 percent from 1995 to 2005, state court class-action filings during the same period rose over 1,000 percent. *Ibid.*[3]

Unsurprisingly, the most "magnetic" courts were also the ones most likely to certify a class with minimal scrutiny, or were otherwise seen as more favorable to plaintiffs (or to class counsel actually controlling the litigation). See S. Rep. No. 109-14, at 14; 151 Cong. Rec. 2392 (Feb. 16, 2005) (statement of Rep. Keller); 151 Cong. Rec. 2074 (Feb. 10, 2005) (statement of Sen. Hatch); 151 Cong. Rec. 2084 (Feb. 10, 2005) (statement of Sen. Enzi); 151 Cong. Rec. 2071 (Feb. 10, 2005) (statement of Sen. Vitter); 151 Cong. Rec. 1663 (Feb. 8, 2005) (statement of Sen. Grassley). Congress noted that state courts sometimes displayed bias or favored plaintiffs and their in-state counsel over largely out-of-state defendants. See 151 Cong. Rec. 2431 (Feb. 17, 2005) (statement of Rep. Goodlatte) (noting the preponderance of class actions in state courts that "are overwhelmingly biased and favorable to the plaintiffs in a class action").

This case arises out of one of those "magnet" jurisdictions—the Circuit Court of Miller County, Arkansas. Pet. Br. 4; Nan S. Ellis, *The Class Action Fairness Act of 2005: The Story Behind the Statute*, 35 J. Legis. 76, 95 &

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[3] In one "magnet jurisdiction," the Circuit Court of Madison County, Illinois, class-action filings increased *3,650* percent over the same decade. S. Rep. No. 109-14, at 13; see also Am. Tort Reform Found., *Judicial Hellholes 2006*, at 18 (2006), available at http://bit.ly/LE8gxJ (describing Madison County as a "perennial Judicial Hellhole" with a "reputation as a horrible place to be targeted by a class action").

n.115 (2009) ("The most famous magnet jurisdictions are Madison County, Illinois and Miller County, Arkansas."). Indeed, the American Tort Reform Foundation named Miller County a "judicial hellhole" because of its courts' propensity to "unfair rulings" and "large awards," noting that the county has more tort cases per capita than any other county in the State. Am. Tort Reform Found., *Judicial Hellholes 2006*, at v, 22 (2006), available at http://bit.ly/LE8gxJ.

2. Even apart from such magnet jurisdictions, Congress expressed concern that state court judges might certify class actions not to facilitate judicial resolution, but to force settlement. See S. Rep. No. 109-14 at 20-21 (state court judges "often are inclined to certify cases for class action treatment not because they believe a class trial would be more efficient than an individual trial, but because they believe class certification will simply induce the defendant to settle the case without trial"). Indeed, Congress heard testimony about "drive-by certification," a phenomenon in which a judge orders class certification before a defendant has been given a chance to respond or, sometimes, before the defendant has even read the complaint. In one notorious case noted by Congress, a state-court judge certified a nationwide class of 23 million people *the same day* the case was filed, before the defendant even learned that the suit existed. S. Rep. No. 109-14, at 22.

Congress was also concerned that, unlike their federal counterparts, state courts often found themselves ill-equipped to handle large and complicated class suits. Many state courts have "comparatively crushing caseloads," with the average state court judge assigned three times as many cases as the average federal judge. S. Rep. No. 109-14, at 51, 52. And unlike federal judges,

state judges often lack law clerks, magistrates, or special masters who can aid in streamlining and efficiently disposing of new cases. *Id.* at 14; 151 Cong. Rec. 2081 (Feb. 10, 2005) (statement of Sen. Sessions); 151 Cong. Rec. 1670 (Feb. 8, 2005) (statement of Sen. Brownback).

That lack of resources imposed needless delay on litigants and the courts. A 2004 study by the Federal Judicial Center, for example, found that state court judges were more likely than federal judges to let class actions linger without issuing a ruling on class certification. Thomas Wiliging & Shannon Wheatman, *Attorney Reports on the Impact of* Amchem *and* Ortiz *on Choice of a Federal or State Forum in Class Action Litigation* 9 (Federal Judicial Center 2004); see also 151 Cong. Rec. 2081 (Feb. 10, 2005) (statement of Sen. Sessions).

3. Finally, Congress was concerned that the explosive growth of state court class-action litigation in a few jurisdictions had given a handful of state courts undue control over national legal policy. The concentration of suits in a handful of jurisdictions meant that a few courts would make important policy decisions for the rest of the country, "bind[ing] the rights of the residents of [other] States." Pub. L. No. 109-2, §2(a)(4)(C), 119 Stat. 4, 5. Those few state courts were often called upon to interpret and apply the laws of other States. That did not merely create delay and increase the risk of error—it naturally led to the forum State reading other States' laws to be exactly like its own laws. See 151 Cong. Rec. 2081 (Feb. 10, 2005) (statement of Sen. Sessions). State court judges, Congress further determined, were often "less careful than their federal counterparts about applying the procedural requirements that govern class actions." S. Rep. No. 109-14 at 14.

B. CAFA Sought To Expand The Availability Of Federal Courts To Remedy Those Systemic Shortcomings

Confronted by those systemic shortcomings, Congress concluded that "the federal courts are the appropriate forum to decide most interstate class actions because these cases usually involve large amounts of money and many plaintiffs, and have significant implications for interstate commerce and national policy." S. Rep. No. 109-14 at 27; see also Pub. L. No. 109-2, § 2(b), 119 Stat. 4, 5.

To discourage "magnet jurisdictions" and other state court class-action abuses, CAFA confers federal jurisdiction over class actions "in which the matter in controversy exceeds the sum or value of $5 million" and where minimal diversity is present. Pub. L. No. 109-2, § 4(a)(2), 119 Stat. 4, 9, codified at 28 U.S.C. § 1332(d)(2). The statute provides that "the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5 million," *id.* § 4(a)(6), 119 Stat. 4, 10, codified at 28 U.S.C. § 1332(d)(6), "abrogat[ing] the [prior] rule against aggregating claims," *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 571 (2005). And CAFA did away with the absolute bar on removal by in-state defendants in diversity actions. See 28 U.S.C. § 1441(b)(2). Instead, Congress established a sliding scale that gave judges discretion to permit such removals. See Pub. L. No. 109-2, § 4(a)(3)-(4), 119 Stat. 4, 9, codified at 28 U.S.C. § 1332(d)(3)-(4).

Congress intended courts to read CAFA's jurisdictional provisions "broadly" in favor of a federal forum. See, *e.g.*, S. Rep. No. 109-14, at 43 (Feb. 28, 2005) ("[N]ew section 1332(d) is intended to expand substantially federal court jurisdiction over class actions. Its provisions

should be read broadly, with a strong preference that interstate class actions be heard in a federal court if properly removed by any defendant."). That preference for a broad reading of CAFA's provisions applies to the $5 million amount-in-controversy requirement: As the then-House Judiciary Committee Chairman explained, "if a Federal court is uncertain about whether the $5 million threshold is satisfied, the court should err in favor of exercising jurisdiction." 151 Cong. Rec. 2637 (Feb. 17, 2005) (statement of Rep. Sensenbrenner); see *id.* at 2640.

For a time, CAFA had its intended effect. The filing or removal of class actions in federal court roughly doubled in a single year following CAFA's enactment. Emery Lee & Thomas Willging, *The Impact of the Class Action Fairness Act on the Federal Courts*, 156 U. Pa. L. Rev. 1723, 1754 (2008). But the practice of utilizing damages stipulations to avoid removal threatens to reverse that trend. Putative class representatives seeking to evade federal jurisdiction now regularly stipulate to limit damages to less than $5 million. See pp. 24-25, *infra*. The practice is inconsistent both with CAFA's text and with its intent.

C. Remanding To State Court Based On Damages Stipulations Is Inconsistent With CAFA's Purposes

The Eighth Circuit's automatic remand rule—remanding whenever the class representative or his counsel promises to limit the class's recovery—sets CAFA on its head. It undermines CAFA's goal of federal supervision over the class-action system. It also threatens the interests of absent class members and encourages the very magnet jurisdictions Congress meant to curtail.

Aside from its jurisdiction-conferring sections, CAFA's most significant provisions are devoted to regulat-

ing class-action *settlements* in federal court to ensure that class representatives and their counsel do not enrich themselves at the expense of absent class members.[4] But the automatic remand rule adopted below allows putative class representatives and their counsel to stipulate away damages otherwise awardable to absent class members for nothing more than the chance of evading federal jurisdiction and, with it, the protections federal law would provide. Congress surely could not have intended that *settling* a case for a *guarantee* of 50 cents on the dollar would require compliance with extensive procedural safeguards, but signing a stipulation that gratuitously limits damages to a maximum of 40 cents (or 5 cents) on the dollar to avoid federal jurisdiction is permitted on the putative lead plaintiff's or counsel's unreviewable whim.

Moreover, the Eighth Circuit's practice of reflexively remanding on the basis of such stipulations has allowed "magnet jurisdictions" to flourish once again. District courts in that circuit have repeatedly ordered remand to state courts in recent years (almost always to state courts in Arkansas, often to Miller County), based on damages stipulations.[5] The frequency of such remands has risen

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[4] See 28 U.S.C. § 1712 (imposing limits on contingency fees and other attorney's fee awards in so-called "coupon settlements"); *id.* § 1713 (prohibiting a court from approving a settlement that would cause a net loss to any class member, unless the court finds in writing that nonmonetary benefits to that class member substantially outweigh the monetary loss); *id.* § 1714 (prohibiting class settlements that discriminate against class members based on geographic proximity to the court); *id.* § 1715 (requiring notification of appropriate state and federal officials of proposed settlement).

[5] See *Deaton* v. *Frito-Lay N. Am., Inc.*, No. 12 Civ. 1029, 2012 WL 3986804, at *3 (W.D. Ark. Sept. 11, 2012); *Goodner* v. *Clayton Homes, Inc.*, No. 12 Civ. 4001, 2012 WL 3961306, at *2, *6-7 (W.D. Ark. Sept. 10, 2012); *Basham* v. *Am. Nat'l Cnty. Mut. Ins. Co.*, No. 12 Civ. 4005, 2012 WL 3886189, at *2, *6 (W.D. Ark. Sept. 6, 2012);

dramatically since the Eighth Circuit first suggested in *dicta* that a damages stipulation could defeat CAFA diversity jurisdiction. See *Bell* v. *Hershey Co.*, 557 F.3d 953, 958 (8th Cir. 2009). Its more recent opinion expressly approving such stipulations, *Rowling* v. *Nestle Holdings, Inc.*, 666 F.3d 1069, 1072 (8th Cir. 2012), will only encourage that trend, imposing precisely the costs on plaintiffs, defendants, and the judiciary that CAFA was designed to avoid.

II. DAMAGES STIPULATIONS CANNOT PROVIDE "LEGAL CERTAINTY" TO DEFEAT FEDERAL JURISDICTION

A. A Plaintiff Must, At A Minimum, Show "Legal Certainty" To Defeat CAFA Diversity Jurisdiction

In *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283 (1938), this Court held that a party seeking to defeat federal diversity jurisdiction by limiting the amount in controversy must demonstrate "to a *legal certainty*" that the plaintiff could not recover above the jurisdictional threshold. *Id.* at 289 (emphasis added); see also *id.* at 292 ("removal will be futile and remand will

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Oliver v. *Mona Vie, Inc.*, No. 11 Civ. 4125, 2012 WL 1965613, at *3 (W.D. Ark. May 31, 2012); *Smith* v. *Am. Bankers Ins. Co. of Fla.*, No. 11 Civ. 2113, 2011 WL 6090275, at *5-7 (W.D. Ark. Dec. 7, 2011); *Knowles* v. *Standard Fire Ins. Co.*, No. 11 Civ. 4044, 2011 WL 6013024, at *6 (W.D. Ark. Dec. 2, 2011); *McClendon* v. *Chubb Corp.*, No. 11 Civ. 2034, 2011 WL 3555649, at *10 (W.D. Ark. Aug. 11, 2011); *Thompson* v. *Apple, Inc.*, No. 11 Civ. 3009, 2011 WL 2671312, at *2 (W.D. Ark. July 8, 2011); *Murphy* v. *Reebok Int'l, Ltd.*, No. 11 Civ. 214, 2011 WL 1559234, at *3 (E.D. Ark. Apr. 22, 2011); *Tuberville* v. *New Balance Athletic Shoe, Inc.*, No. 11 Civ. 1016, 2011 WL 1527716, at *2, *6 (W.D. Ark. Apr. 21, 2011); *Harris* v. *Sagamore Ins. Co.*, No. 08 Civ. 109, 2008 WL 4816471, at *2-3 (E.D. Ark. Nov. 3, 2008); *Dowell* v. *Debt Relief Am., L.P.*, No. 07 Civ. 39, 2007 WL 2907881, at *3 (E.D. Mo. Oct. 3, 2007).

follow" where "it is *obvious* that the suit cannot involve the necessary amount" (emphasis added)). The Court so held even though, at least with respect to the diversity statute at issue there, it was the "intent of Congress drastically to restrict federal jurisdiction." *Id.* at 288. Consequently, "legal certainty" must be the minimum standard that would apply under CAFA, which seeks to *expand* federal court jurisdiction.

This Court and the courts below have applied *St. Paul Mercury*'s "legal certainty" test to a number of jurisdictional statutes that contain an amount-in-controversy requirement. For example, before 1980, when §1331 federal-question jurisdiction contained a $10,000 amount-in-controversy requirement, see 28 U.S.C. §1331 (1976), this Court held that *St. Paul Mercury*'s "legal certainty" test applied to that statute. *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 276-277 (1977); cf. Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, §2, 94 Stat. 2369, 2369 (Dec. 1, 1980) (eliminating the amount-in-controversy requirement for federal-question claims). Likewise, courts have held that the "legal certainty" test applies to the $10,000 amount-in-controversy requirement for federal jurisdiction over interstate-shipping suits brought under the Carmack Amendment. 49 U.S.C. §14706; 28 U.S.C. §1337(a). See *Underwriters* v. *BE Logistics, Inc.*, 736 F. Supp. 2d 1311, 1314 (S.D. Fla. 2010); *Nat'l Semiconductor Corp.* v. *Commercial Lovelace Motor Freight, Inc.*, 560 F. Supp. 908, 910 (N.D. Ill. 1983) ("The rule that it must appear to a legal certainty that the claim is actually for less than the jurisdictional amount to justify a dismissal is equally applicable under 28 U.S.C. §1337(a)[.]"); *Bank of Am. N.A.* v. *Engler*, No. 11 Civ. 01457, 2011 WL 5909884, at *2 (C.D. Cal. Nov. 7, 2011).

Thus, a plaintiff seeking to defeat removal under CAFA must at the very minimum satisfy *St. Paul Mercury*'s "legal certainty" standard. As petitioner notes, CAFA provides that "the claims of individual class members shall be aggregated to determine whether" the total exceeds $5,000,000. 28 U.S.C. §1332(d)(6); Pet. Br. 11. That language is most plausibly read to require a district court to independently calculate the aggregate value of class members' *claims* and disregard any stipulation purporting to limit classwide *recovery*. Pet Br. 12. But even if the Court does not adopt that straightforward rule, at the very least, plaintiffs seeking to defeat removal under CAFA must be held to the same standard that applies in other jurisdictional contexts. This Court presumes that, when Congress legislates, it is aware of this Court's precedents. *Hall* v. *United States*, 132 S. Ct. 1882, 1889 (2012); *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 32 (1991); *Cannon* v. *Univ. of Chicago*, 441 U.S. 677, 696-698 (1979). There is no indication that any member of Congress supported applying a *lower* standard under §1332(d)(2) than this Court applied in *St. Paul Mercury*. Accordingly, to the extent a stipulation purports to limit class-wide damages and thereby defeat CAFA jurisdiction, the defendant *at least* should be permitted to insist on proof to a legal certainty that the stipulation would bind the entire putative class to a recovery of less than $5 million.

B. Damages Stipulations Cannot Provide The Required "Legal Certainty"

The Eighth Circuit adopted a rule, applied below, that a plaintiff's stipulation not "to seek damages for the class *** in excess of $5 million" defeats CAFA removal by providing "legal certainty" that no more than $5 million is in controversy. App. 75. But that is erroneous as a mat-

ter of law. For myriad reasons, it is highly uncertain that such purported stipulations can bind absent class members. Accordingly, they cannot provide the "legal certainty" that *St. Paul Mercury* demands.

1. Where, as here, a purported stipulation is signed by a *putative* class representative—a plaintiff not yet certified as the *actual* representative of absent class members—his authority to bind putative class members to any course of action is uncertain at best. As this Court made clear in *Smith* v. *Bayer Corp.*, 131 S. Ct. 2368 (2011), an absent class member cannot be considered a "party" before any class is certified, and "an uncertified class action cannot bind proposed class members." *Id.* at 2379, 2381 n.11. Given that, *at the time of removal* it may be impossible for a court to conclude that any stipulation the *putative* lead plaintiff signs will in fact bind his as-yet *uncertified* class with the requisite legal certainty.

Ironically, courts permitting putative class representatives to stipulate away a portion of the potential class recovery have invoked *St. Paul Mercury* for that result. But *St. Paul Mercury* concluded that a plaintiff may limit *his own* claims if he "does not desire to try his case in the federal court," even "though he would be justly entitled to more." 303 U.S. at 294. Asserting that "CAFA does not change the proposition that the plaintiff is the master of her own claim," some courts have reflexively engrafted *St. Paul Mercury* onto CAFA removal decisions. *Morgan* v. *Gay*, 471 F.3d 469, 474 (3d Cir. 2006), cert. denied, 552 U.S. 940 (2007); cf. *Lowdermilk* v. *U.S. Bank Nat'l Ass'n*, 479 F.3d 994, 999 (9th Cir. 2007) (noting that it was "preserv[ing] the plaintiff's prerogative" to limit recovery). But it goes well beyond *St. Paul Mercury* to hold that the plaintiff in a *putative* class action is master of *absent class members'* claims, long before any court has

granted him authority as a proper class representative to bind the class.

2. Moreover, due process may prevent any stipulation and any judgment in a case involving such a stipulation from being given preclusive effect as to absent class members or from otherwise limiting the ability of such absent class members to bring subsequent suits. Courts have held that "a class action judgment will not bind absent members if they were not accorded due process of the law," and "[t]he preclusive effect of a prior judgment will depend upon whether absent members were '*in fact*' adequately represented by parties who are present." *Pelt* v. *Utah*, 539 F.3d 1271, 1284 (10th Cir. 2008) (emphasis added). This Court has similarly stated that, "[f]or a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members." *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1751 (2011); see also *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 388 (1996) (Ginsburg, J., concurring in part and dissenting in part) ("adequate representation is among the due process ingredients that must be supplied if the judgment is to bind absent class members"). Thus, in subsequent litigation, a second court may conclude that absent class members did not in fact receive adequate representation in the initial class action litigation—particularly in connection with the stipulation—and therefore cannot be bound by the stipulation and judgment.

Indeed, it is highly questionable whether a plaintiff who stipulates away class damages will be deemed a constitutionally adequate representative of absent class members. "Adequacy" requires that, "at a minimum, (1) the interests of the nonparty and her representative are aligned * * * and (2) either the party understood her-

self to be acting in a representative capacity or the original court took care to protect the interests of the nonparty." *Taylor* v. *Sturgell*, 553 U.S. 880, 900 (2008) (citing *Hansberry* v. *Lee*, 311 U.S. 32, 43 (1940)). The Fifth and Seventh Circuits have indicated that a lead plaintiff's ethical and fiduciary duties to the class forbid him from stipulating away class damages for the purpose of evading federal jurisdiction. See *Manguno* v. *Prudential Prop. & Cas. Co.*, 276 F.3d 720, 724-725 (5th Cir. 2002); *Back Doctors Ltd.* v. *Metro Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830-831 (7th Cir. 2011) (Easterbrook, C.J.). At the very least, the prospect of litigation over that issue is another reason that damages stipulations cannot provide "legal certainty" that defendants will not be subject to potential liability exceeding CAFA's $5 million jurisdictional threshold.[6]

3. Finally, even on its own terms, a proposed lead plaintiff's promise not "to *seek* damages for the class * * * in excess of $5 million," App. 75 (emphasis added), cannot confer the legal certainty required to prevent removal to federal court. A promise not to "seek" damages, for instance, does not preclude the promisor from *accepting* a larger amount in settlement if that larger offer can be

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[6] It is clear, moreover, that the stipulation-accepting court cannot insulate itself from subsequent challenge by absent class members. "It is well settled that the court adjudicating a dispute cannot predetermine the binding effect of its own judgment; that can be tested only in a subsequent suit." 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1789, at 554-555 (3d ed. 2005). The Advisory Committee's Note to the 1966 amendment of Rule 23 recognizes as much, noting that a court presiding over a class action should "carefully consider[]" the scope of its judgment to better facilitate *subsequent* consideration of *res judicata* issues. See Fed R. Civ. P. 23 Advisory Comm. Note, 39 F.R.D. 98, 106 (1966).

extracted (which it can). See *Brill* v. *Countrywide Home Loans, Inc.*, 427 F.3d 446, 449 (7th Cir. 2005); see also pp. 21-25, *infra*. That too makes the prospect of "legal certainty" from a damages stipulation illusory.

C. Experience Demonstrates That Damages Stipulations Offer No Legal Certainty

Experience demonstrates that, in practice, damages stipulations will not limit the amount inventive class counsel and lead plaintiffs can receive in settlement. Even if a state court would enforce a damages-capping stipulation at a trial, plaintiffs' counsel understand that, upon defeating removal, they will be able to extract significantly more than the jurisdictional threshold in a state court settlement.

Before CAFA took effect, respondent's counsel below filed dozens of putative class actions in Arkansas state courts in which they prevented removal by purporting to limit the named plaintiffs' requests for recovery to an amount below the $75,000 amount-in-controversy requirement applicable under 28 U.S.C. §1332(a). They then obtained at least 13 sizeable settlements nonetheless, many of which exceeded $100 million.[7] Indeed, the

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[7] See, *e.g.*, *Droste* v. *Farmers Ins. Exch.*, No. CV-2004-294-3 (Ark. Cir. Ct. Miller Cnty. Jan. 21, 2011) (settlement value of $833 million); *Chivers* v. *State Farm Fire & Cas. Co.*, No. CV-2010-251-3 (Ark. Cir. Ct. Miller Cnty. Oct. 14, 2010) ($190-260 million); *Johnson* v. *State Auto Mut. Ins. Co.*, No. CV-2010-114-3 (Ark. Cir. Ct. Miller Cnty. June 25, 2010) ($40 million); *Freeman* v. *Farm Bureau Mut. Ins. Co. of Ark.*, No. CV-2004-294-3-B (Ark. Cir. Ct. Miller Cnty. Apr. 22, 2010) ($34.3 million); *Alexander* v. *Nationwide Mut. Ins. Co.*, No. CV-2009-120-3 (Ark. Cir. Ct. Miller Cnty. July 23, 2009) ($538 million); *Meredith* v. *Clayton Homes, Inc.*, No. CV-2005-72-2 (Ark. Cir. Ct. Miller Cnty. Mar. 3, 2009) ($77.3-92.4 million); *Lane's Gifts and Collectibles, L.L.C.* v. *Yahoo! Inc.*, No. CV-2005-52-1 (Ark. Cir. Ct. Miller Cnty. Apr. 29, 2008) ($4 million); *Lane's Gifts and Collecti-*

attorney's fees awarded to plaintiffs' counsel alone often exceeded eight figures.[8]

Respondent's counsel below achieved those results, after defeating removal, through a multi-pronged process. Initially, they sought to defer dispositive motions until full-blown discovery was completed; Arkansas judges typically grant such requests or defer dispositive motions of their own accord.[9] If the particular judge refused to

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bles, L.L.C. v. *Yahoo! Inc.*, No. CV-2005-052-1 (Ark. Cir. Ct. Miller Cnty. Mar. 12, 2008) ($820,000); *Lane's Gifts and Collectibles, L.L.C.* v. *Yahoo! Inc.*, No. CV-2005-052-1 (Ark. Cir. Ct. Miller Cnty. Feb. 28, 2008) ($2.5 million); *Grammer* v. *Sunbeam Prods., Inc.*, No. CV-2004-407-2 (Ark. Cir. Ct. Miller Cnty. Dec. 14, 2007) ($88-138 million); *Beasley* v. *Reliable Life Ins. Co.*, No. CV-2005-58-1 (Ark. Cir. Ct. Miller Cnty. Mar. 28, 2007) ($41 million); *Lane's Gifts and Collectibles, L.L.C.* v. *Yahoo! Inc.*, No. CV-2005-52-1 (Ark. Cir. Ct. Miller Cnty. July 21, 2006) ($112 million); *Beasley* v. *Prudential Gen. Ins. Co.*, No. CV-2005-58-1 (Ark. Cir. Ct. Miller Cnty. June 12, 2006) ($88 million); *Feely* v. *Allstate Ins. Co.*, No. CV-2004-294-3A (Ark. Cir. Ct. Miller Cnty. May 5, 2005) ($1.4 billion).

[8] See, *e.g.*, *Droste* v. *Farmers Ins. Exch.*, No. CV-2004-294-3 (Ark. Cir. Ct. Miller Cnty. Jan. 24, 2011) (attorney's fees of $37 million); *Chivers* v. *State Farm Fire & Cas. Co.*, No. CV-2010-251-3 (Ark. Cir. Ct. Miller Cnty. Oct. 5, 2010) ($40 million); *Feely* v. *Allstate Ins. Co.*, No. CV-2004-294-3A (Ark. Cir. Ct. Miller Cnty. May 6, 2005) ($63.9 million).

[9] See, *e.g.*, *Basham* v. *Am. Nat'l Cnty. Mut. Ins. Co.*, No. CV-2005-59-3A (Ark. Cir. Ct. Miller Cnty. Oct. 24, 2011) (granting plaintiffs' motion to defer dispositive motions pending discovery); *Basham* v. *Am. Nat'l Cnty. Mut. Ins. Co.*, No. CV-2005-59-3A (Ark. Cir. Ct. Miller Cnty. Aug. 30, 2011) (permitting discovery pending motion to dismiss); *Oliver* v. *Mona Vie, Inc.*, No. 2010-644-1 (Ark. Cir. Ct. Miller Cnty. Aug. 18, 2011) (setting deadline to complete fact discovery before hearing on dispositive motions); *Oliver* v. *Mona Vie, Inc.*, No. 2010-644-1 (Ark. Cir. Ct. Miller Cnty. June 6, 2011) (granting plaintiffs' motion to defer dispositive motions); *Chivers* v. *State Farm Fire & Cas. Co.*, No. CV-2004-294-3 (Ark. Cir. Ct. Miller Cnty. Apr. 28, 2009) (granting motion to defer dispositive motions and al-

delay consideration of a dispositive motion, counsel would simply dismiss the case without prejudice, in order to refile it before a judge thought to be more amenable. For example, in one case, the trial court denied the plaintiffs' motion to stay dispositive motions on November 23, 2011, and plaintiffs voluntarily dismissed the case without prejudice two weeks later. See *McClendon* v. *Chubb Corp.*, No. CV-2010-1176 (Ark. Cir. Ct. Sebastian Cnty. Nov. 23, 2011) (denying plaintiffs' motion to stay dispositive motions); *McClendon* v. *Chubb Corp.*, No. CV-2010-1176-1 (Ark. Cir. Ct. Sebastian Cnty. Dec. 7, 2011) (plaintiffs' motion for voluntary dismissal without prejudice). That same day, the very same plaintiff (McClendon), represented by the same counsel, joined another plaintiff in filing an identical suit in Miller County. See *Basham* v. *Am. Nat'l Cnty. Mut. Ins. Co.*, No. 4:12-cv-04005, 2012 WL 3886189, at *1 (W.D. Ark. Sept. 6, 2012) (recounting procedural history).

Once the case was before an amenable judge, counsel would impose such broad and costly discovery demands upon defendants that compliance would have ultimately cost defendants a large share of the suit's purported value. In one case, for example, plaintiffs' counsel served 185 interrogatories, 385 document requests, and 86 requests for admission. See *Hensley* v. *Computer Sci.*

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lowing discovery); *Basham* v. *Computer Sci. Corp.*, No. CV-2005-59-3A (Ark. Cir. Ct. Miller Cnty. Sept. 19, 2008) (permitting discovery on class certification and other issues pending motion to dismiss); *Meredith* v. *Clayton Homes, Inc.*, No. CV-2005-072-2 (Ark. Cir. Ct. Miller Cnty. July 10, 2007) (permitting full-blown discovery pending consideration of dispositive motions); *Hensley* v. *Computer Sci. Corp.*, No. CV-2005-59-3 (Ark. Cir. Ct. Miller Cnty. June 13, 2006) (same); *Whitehead* v. *Nautilus Grp., Inc.*, No. CV-2005-66-2 (Ark. Cir. Ct. Miller Cnty. Oct. 11, 2005) (deferring motions to dismiss until after class certification).

Corp., No. CV-2005-59-3 (Ark. Cir. Ct. Miller Cnty.). In another case, a Miller County judge ordered a defendant insurance company to produce all of its claims files within 90 days, at an estimated cost of $45 million. Pet. Br. 14. Similar examples abound.[10]

Lawsuits filed after CAFA's effective date have followed a similar pattern. As petitioner notes, after respondent's counsel below settled most of the cases it had filed before CAFA's enactment, they began filing additional putative class actions that included damages-limiting stipulations like those at issue here. Pet. Br. 18. There is every reason to believe counsel will use similar aggressive discovery tactics to force defendants into settlements far above the "stipulated" amount. In one case filed after CAFA, for example, counsel filed a complaint accompanied by a stipulation purporting to cap classwide recovery at $5 million, but also simultaneously served 131 interrogatories and 189 document requests, seeking information going back 20 years. *Basham* v. *Am. Nat'l Cnty. Mut. Ins. Co.*, No. 2011-0623-3 (Ark. Cir. Ct. Miller Cnty.). That is hardly the magnitude of discovery one would expect to see in a suit where the recovery is not expected to exceed $5 million.

Far from limiting the true amount in controversy, damages-limiting stipulations have proved in practice to be illusory. The damages "cap" seems to target a hypo-

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[10] See, *e.g.*, *Oliver* v. *Mona Vie, Inc.*, No. 2010-644-1 (Ark. Cir. Ct. Miller Cnty. Mar. 11, 2011) (serving 157 interrogatories); *Oliver* v. *Mona Vie, Inc.*, No. 2010-644-1 (Ark. Cir. Ct. Miller Cnty. Mar. 11, 2011) (serving 137 document requests); *Oliver* v. *Mona Vie, Inc.*, No. 2010-644-1 (Ark. Cir. Ct. Miller Cnty. Mar. 11, 2011) (serving 220 requests for admission); *Meredith* v. *Clayton Homes, Inc.*, No. CV-2005-072-2 (Ark. Cir. Ct. Miller Cnty. May 22, 2008) (describing how compliance with discovery requests required the production of nearly 3 million pages of documents at a cost of $1.45 million).

thetical future trial whose date will never come. Practical experience thus demonstrates precisely what legal analysis suggests: that damages stipulations of the sort at issue here do not meaningfully limit the amount in controversy. To the contrary, it is clear that they will not prevent far more than the stipulated amount from changing hands in state court following remand. Because such stipulations do not provide the legal certainty this Court's cases at a minimum require, and because they result in precisely the abuses CAFA was meant to end, they cannot be invoked to defeat federal jurisdiction.

III. Putative Stipulations Disserve Judicial Economy And Sound Class-Action Policy

A. Damages Stipulations Undermine The Finality Of Class-Action Judgments

Allowing purported damages stipulations to defeat removal under CAFA also frustrates the ability of class-action plaintiffs and defendants to achieve a comprehensive resolution of such controversies. As this Court has explained, the "goals" of "modern plaintiff class actions" are to solve collective-action problems by allowing litigation of a suit with "common questions when there are too many plaintiffs for proper joinder" and where individual claims "would be uneconomical to litigate individually." *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 809 (1985). Central to those goals is the ability to "bind not only the representative parties but also all nonparticipating members of the class certified by the court." 18A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 4455, at 448 (2d ed. 2002).[11] The Eighth Circuit's rule undermines certai-

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[11] See also Fed. R. Civ. P. 23 Advisory Comm. Note, 39 F.R.D. 69, 99 (1966) (Rule 23 is designed to "result in judgments including those

nty and finality by making it more difficult to reach a global, conclusive resolution of class-action disputes of national importance.

1. The Eighth Circuit's rule all but invites collateral attacks on final judgments in class actions. As discussed above, see pp. 19-20, *supra*, final judgments in class actions are not binding on absent class members if a court determines that they did not receive adequate representation. See *Concepcion*, 131 S. Ct. at 1751; *Taylor*, 553 U.S. at 900. Where the named plaintiff purports to waive some of the class recovery, it is all but inevitable that dissatisfied absent class members represented by counsel seeking greater remuneration will file additional suits after the judgment, asserting that they cannot be bound by its terms because they were not adequately represented. The putative class representative's decision to curtail the class's potential recovery dramatically, for the sole purpose of avoiding federal jurisdiction, gives absent class members more than ample ammunition to assert such claims after the fact.

The Eighth Circuit's approach thus does not merely subject defendants to potential liability far exceeding the $5 million cap. It threatens the finality of otherwise concluded class-action litigation and undermines the incentives for voluntary resolution. If allowed to stand, defendants will be caught in a Catch-22, forced to litigate or settle class-action cases knowing that the outcome might have no preclusive effect on later claims.

2. Even beyond the issues of enforceability and collateral attack, the Eighth Circuit's approach burdens defendants with needless splinter litigation. By artificially

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whom the court finds to be members of the class, whether or not the judgment is favorable to the class").

restricting recovery for remaining class members, the rule permitting limitation of class claims by stipulation increases each class member's incentive to opt out of any possible settlement. The multiplication of lawsuits resulting from opt-outs creates the precise situation class-action settlements are meant to avoid. See, *e.g.*, Mark W. Friedman, Note, *Constrained Individualism in Group Litigation: Requiring Class Members To Make a Good Cause Showing Before Opting Out of a Federal Class Action*, 100 Yale L.J. 745, 754-755 (1990) (explaining that defendants in a class action will grow more reluctant to settle as additional litigants opt out).

Nor is that opt-out risk merely theoretical. The plaintiffs' bar is extraordinarily competitive and responds quickly to perceived litigation opportunities. Plaintiffs' attorneys will seize on the settlement notice provided to potential class members, taking the opportunity to solicit them to opt out of the class action and pursue individual lawsuits in hopes of a greater recovery. Several law firms, such as respondent's counsel below, already have niche practices of filing class actions accompanied by binding stipulations. See pp. 21-25, *supra*. The Eighth Circuit's approach will only encourage scores of new, parallel lawsuits by increasing class members' incentives to opt out of limited-damages class actions.

3. The resulting costs and consequences of that multiplicity of litigation are aggravated further by the absence of mechanisms to organize competing claims, particularly where they affect citizens of multiple States. To be sure, CAFA does not prevent multiple overlapping class actions from being filed in, or removed to, *federal district courts* throughout the Nation. But Congress relied on the Multidistrict Litigation ("MDL") statute to assist in coordinating such claims. That statute author-

izes the Judicial Panel on Multidistrict Litigation to transfer civil actions with common issues of fact "to any district for coordinated or consolidated pretrial proceedings." 28 U.S.C. §1407(a). By coordinating multiple cases in a single forum for pretrial proceedings, the MDL statute provides a mechanism that can, at least in some circumstances, permit multiplicitous litigation to progress in an orderly fashion, "prevent[ing] duplication of discovery and eliminat[ing] the possibility of conflicting pretrial rulings." *In re Liquid Carbonic Truck Drivers Chem. Poisoning Litig.*, 423 F. Supp. 937, 939 (J.P.M.L. 1976). Just two Terms ago, this Court recognized the interplay between CAFA and the MDL statute, explaining that the MDL statute can help address "special problems of relitigation" in the class-action context: CAFA allows removal of "any sizable class action involving minimal diversity," while the MDL statute allows "federal courts [to] consolidate multiple overlapping suits against a single defendant in one court" for pretrial proceedings. *Smith*, 131 S. Ct. at 2381-2382.

But the MDL statute does not apply to related cases pending in state courts, at any stage of proceedings. Nor is there any similar mechanism to coordinate cases pending in multiple States' courts. The rule embraced below thus effectively nullifies any benefits and protections the MDL structure affords to defendants. If this Court affirms the judgment below, defendants would find it much more difficult to resolve disputes of a nationwide character, and would instead be required to litigate a glut of related class actions on multiple fronts in state courts across the Nation.

B. Damages Stipulations Benefit Named Plaintiffs And Class Counsel At The Expense Of Absent Class Members And Defendants

The Eighth Circuit's approach, at bottom, allows putative class representatives to circumvent congressionally imposed protections simply by betraying the class they purport to represent. By stipulating away absent class members' potential recovery, putative class representatives can deny absent plaintiffs the benefit of federal statutory protections designed to guard against precisely such self-serving behavior. And it also prejudices defendants by denying them the impartial federal forum that CAFA's jurisdictional provisions were intended to ensure. The only beneficiaries of the Eighth Circuit's approach are would-be lead plaintiffs and their counsel.

Congress intended that, by providing for federal oversight over important class actions, CAFA would help ensure that class representatives adequately protect the interests of the class. See pp. 13-14, *supra*. Congress thus added a host of procedural safeguards designed to protect the interests of absent class members, including various protections in connection with any proposed classwide settlement. See p. 14 n.4, *supra*. Yet under the rule adopted below, a putative class representative may give away a substantial portion of class members' monetary recovery with *no* settlement in return, without any federal oversight thereof, and then—by having done so—avoid the federal forum and prevent class members from enjoying any federal protections thereafter. And the putative representative can do all that before even being certified as the actual representative of the class. Congress could not have intended to brook such a perverse result. See pp. 12-15, *supra*.

Congress also designed CAFA to provide defendants with an impartial federal forum and curtail the phenomenon of "magnet" state court jurisdictions, which often certify classes with little to no scrutiny and otherwise prove hostile to out-of-state defendants. See pp. 12-13, *supra*. The automatic remand rule, however, has effectively denied defendants access to the federal courts and resulted in a resurgence of the class-action-friendly state-court magnet jurisdictions whose influence Congress sought to diminish. See pp. 14-15, *supra*.

The incentives to putative class representatives and their counsel to utilize damages-limiting stipulations and place their own interests over the putative class's, moreover, should not be underestimated. Although such stipulations theoretically purport to waive recovery in excess of $5 million to gain a remand to state court, they nonetheless have become ubiquitous, particularly in courts within the Eighth Circuit. See pp. 24-25, *supra*. And it is easy to see why. Such stipulations often fail to limit the class's recovery. See pp. 21-24, *supra*. But even if such stipulations actually do end up limiting the class's recovery, they often represent little sacrifice for class representatives and class counsel. Class representatives can often expect that any decrease in their pro rata share of the capped class award will be offset by incentive payments they could receive from any settlement agreement. See, *e.g.*, Elisabeth M. Sperle, *Here Today, Possibly Gone Tomorrow: An Examination of Incentive Awards and Conflicts of Interest in Class Action Litigation*, 23 Geo. J. Legal Ethics 873, 875 (2010) (noting that "incentive awards are common in class action settlements").

As noted previously, there is every reason to believe that class counsel's attorney's fees will not actually be limited by a damages stipulation in the event of a settle-

ment. See pp. 21-22, *supra*. But even if class counsel's fees are also limited by the $5 million cap, that only aggravates the problem: Counsel's fee demands stay the same, but the pot available for paying those fees and compensating the class shrinks. State court procedures on class certification and settlement often lack the rigor of CAFA and Rule 23. And if plaintiffs' counsel sacrifices fees by limiting her clients' recovery, she can make up the difference through filing new lawsuits in bulk. Respondents' counsel below has done just that. *See* pp. 21-25, *supra*. That clearly is not the result CAFA was intended to achieve.

CONCLUSION

For the foregoing reasons and those stated in the petitioner's brief, the judgment of the Eighth Circuit should be reversed.

Respectfully submitted.

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October 2012

AMICUS CURIAE BRIEF

FILED
OCT 29 2012
OFFICE OF THE CLERK

No. 11-1450

In the

Supreme Court of the United States

THE STANDARD FIRE INSURANCE COMPANY,

Petitioner,

v.

GEORGE KNOWLES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE DEFENSE RESEARCH INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* DRI[1]

The Defense Research Institute ("DRI") is an international organization that includes more than 22,000 attorneys engaged in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys and the civil justice system. DRI's members routinely defend clients in collective litigation across the Nation, whether under Federal Rule of Civil Procedure 23 or other applicable provisions. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and—especially on national issues—consistent.

To promote its objectives, DRI participates as *amicus curiae* in cases that raise issues of vital concern to its membership, their clients, and the judicial system. This is just such a case. DRI believes that resolution of the important federal jurisdiction and procedural issues raised by this case is critical because the approach taken by the lower

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* DRI states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties received notice of *amicus curiae*'s intent to file this brief. Petitioner and respondent have consented to the filing of this brief and letters reflecting their consent have been filed with the Clerk of Court.

court will eviscerate the protections that the Class Action Fairness Act of 2005 ("CAFA") affords to absent class members and to non-resident defendants. The issue presented affects a substantial number of cases of nationwide importance that are potentially removable under CAFA.

The decision below allows class action attorneys and their named representatives to avoid federal court review of cases with national implications by sacrificing the damages claims of absent class members. This is the very sort of gamesmanship that Congress sought to eliminate with the passage of CAFA.

Because the right of removal is an issue of particular significance to defendants, DRI's members and their clients are frequently confronted with the precise issues raised by this case. This Court's review and reversal of the decision below will prevent unseemly and unfair forum-shopping and bring consistency and predictability to removal actions.

SUMMARY OF ARGUMENT

The District Court's decision below allows class representatives to defeat the federal forum Congress made available to protect defendants in large interstate class actions. Indeed, the decision provides a roadmap for class action attorneys and their named representatives to evade federal jurisdiction in virtually every case. That result creates a windfall for class action attorneys at the expense of both defendants and absent class members. The decision cannot be squared with either the plain terms of the Class Action Fairness Act of 2005 ("CAFA") or the dictates of constitutional due process.

Congress enacted CAFA to remedy "a flaw in the current diversity jurisdiction statute (28 U.S.C. § 1332) that prevent[ed] most interstate class actions from being adjudicated in federal courts." S. Rep. No. 109-14, 5 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 6. Congress believed that in allocating the scarce resource of diversity jurisdiction to the most important cases, large interstate class actions "properly belong in federal court," *id.* at 5, 2005 U.S.C.C.A.N. at 6, and that prior law "enable[d] lawyers to 'game' the procedural rules and keep nationwide or multi-state class actions in state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class member interests." *Id.* at 4, 2005 U.S.C.C.A.N. at 5–6.

Congress thus amended Title 28 to provide federal jurisdiction over *any* putative class action filed in state court against a non-citizen defendant

where class claims total $5 million. *See* 28 U.S.C. § 1332(d). Moreover, Congress specifically intended CAFA to make it more difficult "for plaintiffs' counsel to 'game the system' by trying to defeat diversity jurisdiction" and to firmly "place[] the determination of more interstate class action lawsuits in the proper forum—the federal courts." S. Rep. No. 109-14 at 5, 2005 U.S.C.C.A.N. at 6. As this Court explained just last term, CAFA was enacted to "enable[ ] defendants to remove to federal court any sizable class action involving minimal diversity of citizenship." *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2382 (2011).

There is no question that the congressional requirements of CAFA have been met in this case. The requirement of minimal diversity is easily satisfied as the named plaintiff is diverse from the defendant, and the potential classwide damages are worth well north of the $5 million amount-in-controversy requirement. Indeed, the District Court acknowledged that CAFA's removal conditions have been satisfied, Pet. App. 8a, yet remanded the case to state court on the basis of a damages "stipulation" signed by the class representative. Pet. App. 9a, 15a. In this stipulation, the named plaintiff vowed to refrain from "seek[ing] damages *for the class* ... in excess of $5,000,000 in the aggregate." Pet. App. 75a (emphasis added).[2]

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[2] The signed affidavit accompanying plaintiff's complaint states: "I do not now, and will not at any time during this case, whether it be removed, remanded, or otherwise ... seek damages for the class as alleged in the complaint to which this stipulation is attached in excess of $5,000,000 in the aggregate (inclusive of

At the outset, it is plain that the damages stipulation in this case had but one purpose: to defeat federal jurisdiction. The plaintiff made his intentions clear by alleging that his "stipulation" was "binding on plaintiff for purposes of establishing the amount-in-controversy," and "[a]s such, there is neither diversity nor Class Action Fairness Act ('CAFA') jurisdiction for this claim in federal court." Pet. App. 60a. What is less clear is that the stipulation actually precludes the plaintiff and the class from accepting an award in excess of $5 million. Plaintiff fails to state that he will not *accept* damages in excess of $5 million and excepts attorneys' fees from the damages stipulation. *See* Pet. App. 75a. These deficiencies alone should be fatal to the District Court's conclusion that plaintiff demonstrated to a "legal certainty" that CAFA's jurisdictional threshold would not be breached.

This case, moreover, is simply representative of the onslaught of clever maneuvering that class action plaintiffs' attorneys have employed to avoid the federal jurisdiction provided by CAFA. In *Freeman v. Blue Ridge Paper Products, Inc.*, 551 F.3d 405, 406 (6th Cir. 2008), for example, plaintiffs' attorneys filed five identical suits in state court covering distinct six-month time periods and limiting each period to less than CAFA's $5 million threshold. Counsel conceded that the only basis for dividing the claims was "to avoid CAFA." *Id.* at 407. The Sixth Circuit refused

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costs and attorneys' fees). I understand that this stipulation is binding, and it is my intent to be bound by it." Pet. App. 75a.

to allow plaintiffs to "artificially structur[e]" their lawsuit to evade federal jurisdiction and aggregated the five lawsuits for the amount-in-controversy requirement. *Id.* at 407–08; *see also Proffitt v. Abbott Labs*, No. 2:08-CV-151, 2008 WL 4401367 (E.D. Tenn. Sept. 23, 2008) (treating eleven identical lawsuits as one lawsuit for purposes of the amount-in-controversy requirement); *but cf. Anglin v. Bristol-Myers Squibb Co.*, No. 12-60-GPM, 2012 WL 1268143 (S.D. Ill. April 13, 2012) (remanding to state court three identical mass actions splintered into suits with less than 100 plaintiffs); *Marple v. T-Mobile Cent. LLC*, 639 F.3d 1109 (8th Cir. 2011) (permitting plaintiffs to break up lawsuit into ten identical lawsuits covering ten different time periods).

The decision below misapplies foundational rules of civil procedure, thwarts Congress' intent in enacting CAFA, and risks undermining the due process rights of unnamed class members. At its most basic, the trial court below erred by applying the general rule that an *individual* plaintiff is "the master of his complaint" to a *representative* suit. While it might be possible for a lawyer to have an informed dialogue with an individual client in which the latter agrees to limit any recovery in order to secure a more favorable forum, such a conversation cannot take place between the class representative's lawyer and the class. Nonetheless, the trial court permitted the class representative to bind unnamed class members to a fraction of their potential damages in order to evade federal jurisdiction. That result cannot stand. The *sine qua non* of a representative action is that the named class member must fairly and adequately represent the

unnamed class members at all times. *Hansberry v. Lee*, 311 U.S. 32, 45 (1940). But if representing a sufficiently numerous class will deprive the named plaintiff of a favored state forum unless the class representative purports to forego a portion of class members' damages, the conflict between the named plaintiff and absent class members is obvious.

Nor is the possibility of an opt-out a remotely satisfactory option. An absent class member has a right to opt out of a properly certified class action—the opt-out right is not a means of solving an inherent adequacy problem or ignoring a clear conflict of interest that renders class treatment inappropriate. Moreover, the possibility of later collateral challenges by absent class members who learn their damage claims were surrendered risks undermining CAFA's purposes and eliminating the efficiencies the class action device is designed to achieve. In short, the answer is clear: A class representative may not jettison the constitutional rights of absent class members in order to avoid the jurisdictional threshold contained in CAFA.

ARGUMENT

I. Whatever Its Effect In An Individual Action, A Damages "Stipulation" Cannot Preclude Removal In The Class Context.

The well-pleaded-complaint rule generally allows a plaintiff to choose between federal and state court. Since the plaintiff is "the master[] of the complaint," *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398–99 (1987), he may forego a federal claim and thus avoid removal to federal court. *See Holmes Group, Inc. v.*

Vornado Air Circulation Sys., Inc., 535 U.S. 826, 831 (2002) (quoting *Caterpillar Inc.*, 482 U.S. at 398–99). The "well-pleaded-complaint rule" thus enables a plaintiff "by eschewing claims based on federal law ... to have the cause heard in state court." *Id.* (internal quotation omitted).

A similar rule applies in diversity actions. In *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 293–94 (1938), this Court held, subject to a good faith pleading requirement, that a plaintiff who "does not desire to try his case in the federal court may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove." As master of her complaint, a diversity plaintiff may limit the amount of damages she seeks and remain in state court. *See id.*

In theory, the ability of the individual plaintiff to limit recovery below the amount-in-controversy could have the beneficial consequence of introducing a degree of "voluntary tort reform" that could limit recoveries and perhaps facilitate settlement by placing an outer limit on plaintiff's recovery. In practice, however, the rule has proven problematic, because a number of states permit plaintiffs, once litigation has begun, to request a different award from the amount specified in the complaint. *See Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1097 n.11 (11th Cir. 1994). In such jurisdictions, the non-binding nature of plaintiff's prayer for relief "created the potential for abusive manipulation by plaintiffs." *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1410 (5th Cir. 1995). Plaintiffs could "plead for damages below the

jurisdictional amount ... with the knowledge that the claim is actually worth more, but also with the knowledge that they may be able to evade federal jurisdiction by virtue of the pleading." *Id.*

As a result, federal courts allow an individual plaintiff to plead herself out of federal court by limiting damages only where that limitation is legally binding. *De Aguilar*, 47 F.3d at 1410; (citing 1A James W. Moore et al., *Moore's Federal Practice* ¶ 0.157[6], at 133–34 (2d ed. 1993) (stating that plaintiff "may prevent removal by the expedient of suing for less than the jurisdictional amount unless his attempted waiver of the balance is legally ineffective")). As *Moore's Federal Practice* explains, where under state law a plaintiff can "recover more on his state claim than the jurisdictional minimum, the case is removable." 16 *Moore's Federal Practice*, § 107 App. 103 (3d ed. 2002).

Courts have ensured that a plaintiff's limitation on recovery is enforceable through shifting burdens that do not simply take the plaintiff's professed self-restraint at face value. To ensure that the "right of removal" guaranteed to defendants by 28 U.S.C. § 1332 is not subject "to the plaintiff's caprice," *St. Paul*, 303 U.S. at 294, an out-of-state defendant need not accept a plaintiff's self-serving damages request. *See, e.g.*, *De Aguilar*, 47 F.3d at 1410; *Rolwing v Nestle Holdings, Inc.*, 666 F.3d 1069, 1070–71 (8th Cir. 2012); *In re Shell Oil Co.*, 970 F.2d 355, 356 (7th Cir. 1992). Rather, a defendant is entitled to remove a diversity action to federal court by demonstrating that—regardless of the plaintiff's prayer for relief—the actual amount-in-controversy is greater than the

jurisdictional threshold.[3] *See, e.g., De Aguilar*, 47 F.3d at 1410. Once a defendant has made such a showing, a plaintiff may defeat removal only by establishing to a "legal certainty" the inability to recover more than the jurisdictional amount-in-controversy. *See St. Paul*, 303 U.S. at 289.

In the run-of-the-mill diversity case, the Courts of Appeals have allowed plaintiffs to meet this "legal

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[3] The Courts of Appeals vary the standard by which a defendant must demonstrate that the amount-in-controversy is greater than the jurisdictional threshold. The majority approach employed by the Fifth, Seventh, Eighth, and Eleventh Circuits is that the defendant needs to show jurisdiction by a preponderance of the evidence; where the defendant satisfies that burden, the plaintiff may avoid federal jurisdiction only by showing that it is legally impossible to recover in excess of the jurisdictional minimum. *Blomberg v. Serv. Corp. Int'l*, 639 F.3d 761, 763 (7th Cir. 2011); *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 754 (11th Cir. 2010); *Bell v. Hershey Co.*, 557 F.3d 953 (8th Cir. 2009); *1994 Exxon Chem. Fire v. Berry*, 558 F.3d 378 (5th Cir. 2009). The First and Sixth Circuits take a similar approach. *See Amoche v. Guar. Trust Life Ins. Co.*, 556 F.3d 41, 51–52 (1st Cir. 2009) (requiring defendant to show a "reasonable probability" of damages in excess of the jurisdictional minimum); *Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 401, 407–08 (6th Cir. 2007) (requiring defendant to show that damages are "more likely than not" in excess of the jurisdictional minimum). In contrast, at least where the plaintiff specifically requests damages below CAFA's jurisdictional threshold, the Ninth and Third Circuits hold that a "defendant will be able to remove the case to federal court by showing to a legal certainty that the amount-in-controversy exceeds the statutory minimum." *Lowdermilk v. U.S. Bank Nat'l Ass'n*, 479 F.3d 994, 998–99 (9th Cir. 2007) (quoting *Morgan v. Gay*, 471 F.3d 469, 474 (3rd Cir. 2006)).

certainty" test by filing a binding affidavit with their complaint stating that they will neither seek nor accept an award that exceeds the jurisdictional threshold of 28 U.S.C. § 1332(a). *See Rolwing*, 666 F.3d at 1070–71; *De Aguilar*, 47 F.3d at 1412; *In re Shell Oil Co.*, 970 F.2d at 356 ("Litigants who want to prevent removal must file a binding stipulation or affidavit with their complaints.").

At the end of the day, an individual plaintiff's ability to sue a non-resident defendant and yet avoid federal court is limited by the relatively low amount-in-controversy requirement contained in 28 U.S.C. § 1332(a). Individual litigants who wish to sue an out-of-state defendant and remain in state court may do so, but only where they make a binding disclaimer of any entitlement to damages in excess of the $75,000 amount-in-controversy requirement. *See St. Paul*, 303 U.S. at 289. While that option will rarely make sense in an individual action, there may be circumstances in which a lawyer counsels a client that preserving a state forum is worth limiting a potential recovery below the amount-in-controversy threshold. And as long as the stipulation is legally binding, such a counseled choice of preserving the state forum should not sacrifice the defendant's rights. The requirement that a plaintiff submit a binding damages stipulation preserves an out-of-state defendant's statutory right to remove to federal court any case in which a plaintiff may be awarded damages in excess of the jurisdictional threshold.

But whatever the merits of the stipulated damages rule in *individual* actions, it is clear that such stipulations have no place in *representative*

litigation. Indeed, the conditions necessary for valid stipulations in the individual context are impossible to replicate in the class action context.

First, the Supreme Court has recently confirmed that absent class members are not bound by actions taken by the named plaintiff before certification. *See Smith*, 131 S. Ct. at 2382. Thus, counsel for a named plaintiff has no authority to bind absent class members to a damages stipulation. *See id.* And if such a limitation were effective, it would create due process problems of the first order. But in the individual context, a stipulation can defeat federal jurisdiction only if it is, indeed, binding. Moreover, while a lawyer can counsel an individual plaintiff about the pros and cons of limiting damages in order to secure a forum perceived to be more favorable, no such communication is possible in the pre-certification context. Indeed, the fact that securing the named plaintiff's preferred forum requires limiting absent class members' recoveries indicates an inherent conflict of interest and adequacy problem that should preclude certification.

Second, damages stipulations that limit the amount of damages ultimately to be awarded to absent class members distort the class action device by incentivizing class members to opt out. But the opt-out right exists to protect absent class members, not as a means to ameliorate inherent adequacy problems by giving class members with a particularly good damages claim an artificial incentive to opt out.

Third, absent class members may be able to collaterally attack judgments that give effect to damages stipulations on due process grounds.

Whatever the ultimate resolution of those collateral attacks, there are ample incentives to bring them, which defeats the very efficiency rationale that gave rise to the class action device in the first place. For all of these reasons, the court below erred in holding that a named plaintiff in a putative class action could evade federal jurisdiction by stipulating to a reduction in aggregated class damages.

A. The District Court's Conclusion that the Named Plaintiff's Damages Stipulation Binds Absent Class Members in a Putative Class Action Conflicts with this Court's Holding in *Smith v. Bayer Corporation*.

The District Court's conclusion that a damages stipulation in a putative class action is "legally binding" conflicts with this Court's holding in *Smith v. Bayer Corporation*. In that case, this Court held that "the mere proposal of a class ... c[an] not bind persons who [a]re not parties." 131 S. Ct. at 2382. "[I]n the absence of certification," the Court wrote, "[n]either a proposed class action nor a rejected class action may bind nonparties." *Id.* at 2380.

In the present case, the District Court found that the aggregated claims of individual class members exceeded CAFA's $5 million amount-in-controversy requirement, but nevertheless concluded that the named plaintiff could defeat federal jurisdiction by stipulating to a reduction in the amount of aggregated damages sought by the class. Pet. App. 8a–9a, 15a. That conclusion cannot be reconciled with either *Smith* or basic principles of due process. Under *Smith*, absent class members cannot be bound

before certification. 131 S. Ct. at 2380, 2382. As the Fifth Circuit has noted, "by definition [unnamed potential class members] do not and cannot participate in any stipulations concocted by the named parties." *Stirman v. Exxon Corp.*, 280 F.3d 554, 563 n.7 (5th Cir. 2002) (internal quotation marks omitted).

The District Court therefore clearly erred in holding that an affidavit that purported to limit damages on behalf of unnamed and absent class members demonstrated to a "legal certainty" that CAFA's jurisdictional threshold was not satisfied. *See* Pet. App. 9a, 15a. The decision below, moreover, turns CAFA on its head, permitting a named representative and class counsel to defeat removability *by sacrificing the claims of absent class members*. That absurdity is inconsistent not only with the text and purposes of CAFA, but also with due process.

At a minimum, procedural due process requires adequate notice, an opportunity to be heard, and adequate representation by the named plaintiff before a state may bind absent class members. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985) ("If the forum State wishes to bind an absent plaintiff [class member] concerning a claim for money damages ... [t]he plaintiff must receive notice plus an opportunity to be heard and participate in the litigation"); *id.* at 812 (due process requires "that the named plaintiff at all times adequately represent the interests of the absent class members").

The absent class members in the present case have had neither notice nor an opportunity to be

heard on the damages issue. Moreover, a named plaintiff who stipulates away a large portion of class members' potential damages in favor of his forum of choice can hardly be considered an adequate representative. *See Rolwing*, 666 F.3d at 1070–71 (holding that named representative could bind absent class members to less than $5 million of their $12 million lawsuit in order to evade federal jurisdiction). There is an inherent conflict of interest between a named plaintiff who desires a state forum and absent class members whose damage claims must be sacrificed in order for the named plaintiff to secure that wish.

Due process requires that absent class members be afforded fair and adequate representation at all times. *See Hansberry*, 311 U.S. at 45. And the adequacy requirement secures this due process right as it "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625–26 (1997); *see also Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157–58 n. 13 (1982). Indeed, the absence of a material conflict of interest between named and absent class members is central to the adequacy inquiry: "[A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *E. Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974)).

Where, as here, a class representative may obtain her favored state forum only by purporting to stipulate away the damages of absent class members

there is a material conflict of interest. Such a representative is constitutionally inadequate because she does not "possess the same interest ... as the class members." *E. Tex. Motor Freight*, 431 U.S. at 403 (internal quotation marks omitted). The representative, in other words, would have no incentive—indeed would be legally forbidden—to seek the entire amount of class damages. That conflict should preclude certification under Federal Rule of Civil Procedure 23 and the Due Process Clause. And, more to the point, it should make clear that the named plaintiff is in no position to adequately represent absent class members when it comes to stipulating away their damage claims.

In *Stirman v. Exxon Corp.*, 280 F.3d 554 (2002), for example, the Fifth Circuit held that the class representative was inadequate because she had "no incentive to fully litigate" the claims of unnamed class members. *Id.* at 563 n.7. A key factor in the Fifth Circuit's analysis was that the named representative had likely "forfeited the rights of some class members" by offering to stipulate to, among other things, "a four-year limit on seeking damages." *Id.*

So too here. By stipulating away a portion of the absent class members' damages in favor of his forum of choice, the named plaintiff has "forfeited the rights of some class members" and has "no incentive to fully litigate" their claims. *See id.* The named plaintiff has vowed to limit class damages to a fraction of their worth. This material conflict precludes the named plaintiff from serving as a constitutionally adequate representative for the precise purpose of

stipulating away the ordinary entitlement to a full damages remedy. *See id.*

Further, the common class action practice of awarding incentives to named plaintiffs exacerbates the conflict of interest that arises when a named plaintiff stipulates away a large portion of class damages. *See Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) (incentive awards "are fairly typical in class action cases") (citing 4 William B. Rubenstein et al., *Newberg on Class Actions* § 11:38 (4th ed. 2008)). Incentive awards are intended to compensate class representatives for the time and effort they invested in the litigation, but they all too often compensate named representatives at an exorbitant rate relative to unnamed class members. *See Rodriguez*, 563 F.3d at 958–61. Indeed, incentive awards were one of the reasons Congress enacted CAFA. Congress found that "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed, such as where ... (B) unjustified awards are made to certain plaintiffs at the expense of other class members." Pub. L. No. 109-2, § 2(a)(3), 119 Stat. 4.[4]

Incentive awards give class representatives—whose ultimate award may bear little relation to the class award—an added inducement to compromise

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[4] Congress has expressed concern with incentive awards in other contexts. For example, the Private Securities Litigation Reform Act of 1995 (PSLRA) forbids the granting of incentive awards to class representatives in securities class actions. *See* 15 U.S.C. § 78u-4(a)(2)(A)(vi).

the damage claims of absent class members. They may help to explain why a named plaintiff is content to stipulate away a portion of class damages. They thus create an "unacceptable disconnect" between the named representative and members of the class. *Rodriguez*, 563 F.3d at 958–61. As the Ninth Circuit has observed, when faced with the prospect of a lucrative incentive award, class representatives may be "more concerned with maximizing [their own] incentives" than with fully litigating the claims of absent class members. *Staton v. Boeing Co.*, 327 F.3d 938, 977–78 (9th Cir. 2003) (declining to approve settlement agreement with incentive awards).[5] But regardless of a named plaintiff's motivation, the inherent tension between the named plaintiff's desired forum and the interests of absent class members is fatal to the named class members' ability to stipulate away valuable rights of absent class members. *See E. Tex. Motor Freight*, 431 U.S. at 403.

In short, the District Court in this case erred by failing to recognize the fundamental difference between an individual and a representative action. While an individual plaintiff may make a decision informed by counsel to enter a binding agreement to limit damages in order to remain in state court, *see*

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[5] Incentive awards also create at least the appearance of impropriety and may violate rules of professional conduct, which prohibit fee sharing among clients and their counsel. *See Rodriguez*, 563 F.3d at 958–61.

St. Paul, 303 U.S. at 293–94, a putative class representative has no ability to provide such counsel to absent class members and no authority to bind absent class members to a fraction of their damages, *see Smith*, 131 S. Ct. at 2380–82. And any effort to give such a limitation binding effect would plainly violate the due process rights of proposed class members. As this Court explained in *Hansberry*, to permit a material conflict of interest to exist between the class representative and absent class members would afford opportunities "for the fraudulent and collusive sacrifice of the rights of absent parties." 311 U.S. at 45.

B. Allowing CAFA-Defeating Damages Stipulations Would Also Distort the Class-Action Device Generally and the Opt-Out Process in Particular.

It is certainly no answer that absent class members with viable damages claims retain the option of opting out of the class after certification. To the contrary, the distorting effect of plaintiff's proposal on the class action device in general and the opt-out process in particular is yet an additional reason for rejecting it. The opt-out process is a necessary option for absent class members when it comes to a class action involving substantial damages. It is not a means to ameliorate glaring conflicts of interest or adequacy problems that render class treatment inappropriate.

The Due Process Clause guarantees absent class members the right to opt out of class litigation when the action is "predominantly" for money damages. *Phillips Petroleum*, 472 U.S. at 811–12 & n.3; *Wal-*

Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1751 (2011) ("For a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class."). CAFA-defeating jurisdictional stipulations of the kind endorsed by the District Court pit the named plaintiff's desire to avoid federal court against the absent class members' right to seek full compensatory damages. That conflict of interest should preclude a named plaintiff who seeks to preserve a state forum from serving as an adequate representative of absent class members for purposes of stipulating limits on classwide relief. But if such stipulations were upheld, absent class members would have an artificial and unusual incentive to exercise their right to opt out of the class action. That result would not only defeat the purposes of CAFA but it would distort Rule 23 by eliminating the efficiencies that the class device promises to class plaintiffs and defendants alike.

The type of relief requested in a class action matters, as this Court underscored in *Wal-Mart*. As the Second Circuit has explained, "[w]here class-wide injunctive or declaratory relief is sought ... there is a presumption of cohesion and unity between absent class members and the class representatives such that adequate representation will generally safeguard absent class members' interests and thereby satisfy the strictures of due process." *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 165–66 (2d Cir. 2001). This "presumption

of cohesion and unity" is permissible because such relief "does not vary based on the subjective considerations of each class member's claim, but 'flow[s] directly from a finding of liability on the ... claims for class-wide injunctive and declaratory relief.'" *Id.* (quoting *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 416 (5th Cir. 1998)).

In contrast, where, as here, compensatory damages are sought "the presumption of class homogeneity and cohesion falters." *Robinson*, 267 F.3d at 165. This is because the amount of individual damages suffered by class claimants may vary dramatically, depending on the circumstances and merits of each plaintiff's claim. *Id.* at 166. These individualized considerations give rise to divergent interests. *See id.* And since "members of a class seeking substantial monetary damages may have [such] divergent interests, due process requires that putative class members receive notice and an opportunity to opt out." *In re Veneman*, 309 F.3d 789, 792 (D.C. Cir. 2002) (citing Fed. R. Civ. P. 23(c)(2); *Robinson*, 267 F.3d at 165–66).

In compensatory damages actions, absent class members retain their right to pursue their claims separately where "active participation would better protect their individual interests." *Robinson*, 267 F.3d at 165–66. If this Court were to uphold the approach taken by the District Court in this case and allow stipulations that place artificial limits on class members' recovery if they remain in the class, an unusually high percentage of absent class members would benefit from exercising their constitutional right to opt out of the representative suit. *See In re*

Silicone Gel Breast Implant Prods. Liab. Litig., No. CV-92-P-10000-S, 1994 WL 578353, at *6 (N.D. Ala. Sept. 1, 1994) (noting that approximately 5% of a class had opted out of a settlement because "they believed they could recover more through individual litigation than under the settlement"). This artificial inflation of the opt-out right would in turn dismantle the very benefits of class action litigation and undermine the goals of CAFA.

The utility of the class action device hinges on efficiency and aggregation. As Congress found in enacting CAFA, "[c]lass-action lawsuits are an important and valuable part of the legal system when they permit the fair and *efficient* resolution of legitimate claims of numerous parties *by allowing the claims to be aggregated into a single action* against a defendant that has allegedly caused harm." CAFA § 2(a)(1), 28 U.S.C. § 1711 note (emphases added). Thus, aggregation, or the "efficiency and economy of litigation" is "a principal purpose of the [class action] procedure." *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974). And the purpose of Rule 23(b)(3) damages suits in particular is to "achieve economies of time, effort, and expense and promote ... uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Amchem Prods.*, 521 U.S. at 615 (quoting Adv. Comm. Notes, 28 U.S.C. App., p. 697).

Representative litigation can improve the efficiency and economy of litigation in several ways. First, the aggregation of claims decreases the expense and dead-weight loss of repetitive trials. *See*

Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996). Representative litigation may also solve the problem of small recoveries by aggregating "relatively paltry potential recoveries" into "something worth someone's (usually an attorney's) labor." *Amchem Prods.*, 521 U.S. at 617. A class action can additionally improve efficiency in so-called "limited fund cases." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 839 (1999). In such cases, the centralization of claims in one forum allows a court to divide limited assets equitably among prevailing class plaintiffs. Finally, the class action device achieves efficiency when it minimizes the potential for divergent outcomes and inconsistent verdicts.

The opt-out right runs counter to the overall goal of efficiency by allowing individual class members to force individual trials with the possibility of divergent outcomes. In the normal course, however, the incentives to opt out in properly certified class actions are relatively limited so that the opt-out right secures the rights of individual class members without sacrificing the overall efficiency justification for the class action device. But the creation of artificial incentives to opt out distorts that balance and creates the possibility that defendants will face both class actions and numerous individual actions. The prospect that artificial limitations of damages will induce a large number of absent class members to opt out may well "defeat[] the policies behind Rule 23 class actions." *Tedesco v. Mishkin*, 629 F. Supp. 1474, 1483 (S.D.N.Y. 1986).

Indeed, not only do such artificial incentives to opt out create the prospect of duplicative individual

trials, they also threaten the viability of any class settlement "by destroying its ability to provide the defendant with global peace." Michael Perino, *Class Action Chaos? The Theory of the Core and an Analysis of Opt Out Rights in Mass Tort Class Actions*, 46 Emory L.J. 85, 95 (1997). During settlement discussions in the asbestos litigation, for example, one defendant, Continental Insurance, "made it clear from the beginning that it would only entertain a global settlement if the settlement brought 'total peace.'" *In re Asbestos Litig.*, 90 F.3d 963, 970 (5th Cir. 1996). Continental "was unwilling to pay billions in settlement and forego its substantial arguments against coverage without the assurance that it did not face unknown liabilities in the future." *Id.*; *see also Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 106 (2nd Cir. 2005) ("Practically speaking, class action settlements simply will not occur if the parties cannot set definitive limits on defendants' liability.") (internal quotation marks omitted); *Laughman v. Wells Fargo Leasing Corp.*, 1997 WL 567800, at *1 n.1 (N.D. Ill. Sept. 2, 1997) (defendant would withdraw from settlement if more than 2,000 class members opted out); *In re Silicone Gel Breast Implant Prods.*, 1994 WL 578353, at *6 (the potential for a large number of opt-outs "raises the specter that one or more defendants may elect to withdraw from the settlement in view of risks and costs of potential litigation with these claimants").

The decision below threatens the very aggregation and efficiency rationales that justify representative actions. If this Court affirms and allows a named plaintiff to stipulate away a large

portion of class damages, absent class members would have an unusual incentive to exercise their constitutionally guaranteed right to opt out of the action in order to protect their own interests. This opt-out incentive would in turn destroy the very aggregation and efficiency rationales behind class action litigation, to the detriment of plaintiffs, defendants, and the state and federal court systems.

C. To Enforce Damage Stipulations Would Invite Collateral Attacks that Would Further Undermine the Underlying Purposes of the Class Action Device and CAFA.

If this Court were to sanction the District Court's approach and bind absent class members to a damage award that puts the named plaintiff's interest in preserving a state forum ahead of absent class members' interest in a full recovery, it would invite collateral attack upon collateral attack and obviate the core purposes of the class action device. As noted, enforcing a damage limitation that pits the named class representative's (or his lawyer's) desire to be in state court against the potential recovery of absent class members presents an impermissible conflict that impairs the due process rights of absent class members. *See supra* pp. 11–17. Once a class action has run its course and resulted in either judgment or settlement (at possibly pennies on the dollar of recovery due to the class representative's stipulation), absent class members will have an undoubted incentive to mount collateral due process challenges to any such judgment or settlement. If absent class members are not bound by stipulations

entered into by lawyers laboring under inherent conflicts of interest, the "efficiency and economy of litigation which is a principal purpose of the [class action] procedure," *American Pipe*, 414 U.S. at 553, would be sacrificed. But however such collateral challenges are ultimately resolved, the very fact that they are likely undermines the efficiency rationale of the class action device, not to mention CAFA's promise that defendants facing serious exposure to a class will have a federal forum, not a state forum and multiple follow-on collateral cases.

Rules of finality serve an important function in our Anglo-American judicial system. They act to conserve judicial resources, protect litigants from multiple lawsuits, and facilitate certainty. *See Montana v. United States*, 440 U.S. 147, 153–54 (1979). Generally speaking, the "principles of res judicata, or claim preclusion, apply to judgments in class actions as in other cases." *Juris v. Inamed Corp.*, 685 F.3d 1294, 1312 (11th Cir. 2012) (quoting *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1226 (11th Cir. 1998)). Indeed, the very purpose of the class action device is to dispose of numerous claims within one, efficient proceeding. *See Amchem Products*, 521 U.S. at 615. Thus, the strong public policy favoring the finality of judgments "is particularly muscular in class action suits." *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 593 (3rd Cir. 2010); *see also King v. S. Cent. Bell Tel. & Tel. Co.*, 790 F.2d 524 (6th Cir. 1986).

Yet while finality principles routinely apply to representative litigation they are informed by another principle of general application: An

individual may not be bound by a judgment in which he is not a party. *Taylor v. Sturgell*, 553 U.S. 880, 898 (2008); *see also Pennoyer v. Neff*, 95 U.S. 714, 714 (1877). To enforce a judgment against an absent party who did not receive adequate representation would violate due process. *Id.*; *Hansberry*, 311 U.S. at 41; *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 327 n.7 (1979).

The class action, then, is an exception to the general rule that non-parties are not bound, but the exception depends critically on absent class members receiving adequate representation. *Taylor*, 553 U.S. at 900; *Smith*, 131 S. Ct. at 2380 ("[U]nnamed members of a class action [may] be bound, even though they are not parties to the suit."); *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984) ("[U]nder elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation."). As this Court explained in *Hansberry v. Lee*, "where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree." 311 U.S. at 41–42.

As a result, while class action judgments generally bind absent class members, there is an exception to this rule: "Before the bar of claim preclusion may be applied to the claim of an absent class member, it must be demonstrated that invocation of the bar is consistent with due process."

Juris, 685 F.3d at 1312 (citation omitted). Accordingly, an absent class member "may collaterally attack the prior judgment on the ground that to apply claim preclusion would deny him due process." *Id.* at 1312–13 (citations omitted); *see also* 3 William B. Rubenstein et al., *Newberg on Class Actions* § 8:30 (4th ed. 2011) ("A right of collateral attack, through which the essential fairness of a judgment is questioned during subsequent litigation, remains a potential limitation on the binding effect of determinations in representative actions.").

If this Court were to enforce damage stipulations that pit the named class representative's desire to evade federal court against the full recovery of absent class members, collateral due process challenges would be sure to follow. The outcome of those challenges is far from certain: Over the last decade, a split of authority has developed regarding the proper scope of collateral review. *Juris*, 685 F.3d at 1314 n.16; *see also* Patrick Woolley, *Collateral Attack and the Role of Adequate Representation in Class Suits For Money Damages*, 58 U. Kan. L. Rev. 917, 917 (2010) ("Over the last decade, debate has raged over whether an absent class member may attack a class judgment for inadequate representation in subsequent litigation.").

Traditionally, courts permitted an inadequately represented class member to collaterally attack a class action. *See* Woolley, *supra* at 918–19; 18A Charles Alan Wright et al., *Federal Practice and Procedure* § 4455, at 485 (2002) ("It has long been the general understanding that only adequate representation can justify preclusion against

nonparticipating class members."). Yet more recent decisions suggest that absent class members may not relitigate due process issues that were raised and rejected by the certification court. *See Juris*, 685 F.3d at 1314 n.16; *Epstein v. MCA, Inc.*, 179 F.3d 641, 648 (9th Cir. 1999) ("Simply put, the absent class members; due process right to adequate representation is protected not by collateral review, but by the certifying court initially, and thereafter by appeal within the state system and by direct review in the United States Supreme Court."); *In re Diet Drugs Prods. Liab. Litig.*, 431 F.3d 141, 146 (3rd Cir. 2005) ("Once a court has decided that the due process protections did occur for a particular class member or group of class members, the issue may not be relitigated.").

Other courts, however, still sanction more broad-ranging collateral review. *See Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 257–61 (2d Cir. 2001), *judgment affirmed in part, vacated in part on other grounds by Dow Chemical Co. v. Stephenson*, 539 U.S. 111 (2003) (permitting collateral attack); *Gonzales v. Cassidy*, 474 F.2d 67, 72–73 (5th Cir. 1973) (reviewing certifying court's determination that class representatives were adequate); *Hege v. Aegon USA, LLC*, 780 F. Supp. 2d 416, 429 (D.S.C. 2011) (reviewing whether the notice and representation given absent plaintiffs was constitutionally sufficient).

In the end, the exact scope of collateral review is less important than the reality that artificial constraints on the recovery of absent class members based on stipulations entered by named plaintiffs is a

recipe for collateral attacks. The greater the discount imposed to avoid a federal forum, the more likely such inefficient collateral litigation will ensue. Certainly a rule that has been applied to permit a named plaintiff to stipulate away approximately 60% of class recovery, *see Rolwing*, 660 F.3d at 1070–71 (permitting the named plaintiff to limit $12 million class action to less than $5 million) will inevitably raise serious due process challenges on collateral review. *See Nevada v. United States*, 463 U.S. 110, 135 n. 15 (1983) (citing *Hansberry*, 311 U.S. at 44 for the rule "that persons vicariously represented in a class action could not be bound by a judgment in the case where the representative parties had interests that impermissibly conflicted with those of persons represented"); *Taylor*, 553 U.S. at 900 ("[A] party's representation of a nonparty is 'adequate' for preclusion purposes only if, at a minimum: (1) the interests of the nonparty and her representative are aligned, and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the nonparty's interests.") (internal citations omitted).

If this Court were to permit class representatives to bind absent class members to a damage award grounded in nothing other than CAFA's jurisdictional threshold, it would invite a plethora of due process challenges after judgment. The weighty due process issues raised by such attacks threaten the finality of class action settlements and judgments alike. The resulting uncertainty would undermine the class action procedure in general and settlement efforts in particular. *See Visa U.S.A., Inc.*, 396 F.3d at 106 ("Practically speaking, class action settlements

simply will not occur if the parties cannot set definitive limits on defendants' liability.") (internal quotation marks omitted).

CONCLUSION

The decision below endorses the very sort of gamesmanship that CAFA was designed to eliminate. Congress believed that large class actions involving minimal diversity were suits of national importance that belonged in federal court. CAFA, § 2(a)(4)(A), 28 U.S.C. § 1711 note. And as the Sixth Circuit recently noted, "CAFA was clearly designed to prevent plaintiffs from artificially structuring their suits to avoid federal jurisdiction." *Freeman*, 551 F.3d at 407–08.

In this case, there is no dispute that the statutory predicates of CAFA—minimal diversity and a $5 million amount-in-controversy—are satisfied. As such, the defendant in this case is entitled to remove to federal court. *See Smith*, 131 S. Ct. at 2382 (CAFA "enables defendants to remove to federal court any sizable class action involving minimal diversity of citizenship"). Yet the District Court endorsed an approach that allowed the named plaintiff and his lawyers to opt out of federal jurisdiction—and all at the expense of absent class members and the policy goals underlying CAFA. S. Rep. No. 109-14 at 5, 2005 U.S.C.C.A.N. at 6 (CAFA was enacted to "make it harder for plaintiffs' counsel to 'game the system' by trying to defeat federal jurisdiction"). This Court should send a clear signal that class representatives cannot sacrifice the damages claims of absent class members in favor of their forum of choice or otherwise artificially

structure their lawsuits to avoid the jurisdictional threshold contained in CAFA.

Respectfully submitted,

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October 29, 2012

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
OCT 26 2012
OFFICE OF THE CLERK

No. 11-1450

IN THE

Supreme Court of the United States

THE STANDARD FIRE INSURANCE COMPANY,

Petitioner,

v.

GREG KNOWLES,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICI CURIAE* PROFESSORS E. DONALD ELLIOTT AND JOHN J. WATKINS IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

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[1] No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. All parties have been timely notified of the undersigned's intent to file this brief; both petitioner and respondent have consented to the filing of this brief. Copies of petitioner's and respondent's consents are filed herewith. Funding for this brief was provided by the American Insurance Association, the Property Casualty Insurers Association of America, and the National Association of Mutual Insurance Companies.

for improving the federal courts, and to the Carnegie Commission for Law, Science and Government.

Professor Elliot is the author or co-author of seven books and has published more than 70 articles in professional journals. From 1989 to 1991, he served as Assistant Administrator and General Counsel of the U.S. Environmental Protection Agency. In 1993, he was named to the first endowed chair in environmental law and policy at any major American law school, the Julien and Virginia Cornell Chair in Environmental Law and Litigation at the Yale Law School. From 2003-2009, he was a member of the National Academy of Sciences Board on Environmental Studies and Toxicology, which advises the federal government on environmental issues. He is an elected member of the American College of Environmental Lawyers as well as a member of the boards of the Environmental Law Institute, the Center for Clean Air Policy, and New York University's Institute for Policy Integrity.

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Watkins is a member of the Arkansas Supreme Court's Committee on Civil Practice, which proposes revisions to the Rules of Civil Procedure, Rules of Appellate Procedure-Civil, and Supreme Court Rules, and he has also served as its reporter and advisor. Professor Watkins has served as a Special Justice of the Supreme Court of Arkansas. He is the author or co-author of three books and four dozen law review articles. Throughout his career, Professor Watkins's particular interest and focus has been on the subject of civil procedure.

The purpose of this brief is to address matters that bear on the Court's determination of an important issue regarding class actions: whether a named class action plaintiff may successfully evade federal court jurisdiction by filing with his class action complaint a "stipulation" that attempts to limit the damages he seeks for the absent putative class members to less than the federal jurisdictional threshold of $5 million. This brief explains how such a stipulation contravenes both the plain language of 28 U.S.C. § 1332(d)(6), as amended by CAFA, as well as the history of class actions and the legislative history of CAFA.

STATEMENT

On April 13, 2011, respondent Greg Knowles ("Knowles") commenced the underlying lawsuit against petitioner The Standard Fire In-

surance Company ("Standard Fire") by way of a complaint filed in the Circuit Court of Miller County, Arkansas. The complaint alleges that Standard Fire insured Knowles's dwelling; Knowles suffered damage to his property on or about March 10, 2010; Knowles made a claim for his loss; and in making payment to Knowles, Standard Fire failed to include certain fees for general contractor services known as "general contractor overhead and profit" ("GCOP"). Pet. App. 3, 63-65. Knowles asserts that Standard Fire concealed information regarding his entitlement to GCOP and that Standard Fire's failure to compensate him for GCOP constitutes a breach of the policy contract. *Id.* at 3, 64, 69-70, 71-72.

Knowles filed his complaint as a putative class action under Arkansas Rule of Civil Procedure 23. *Id.* at 2-3, 55-75. He purports to bring his lawsuit on behalf of other policyholders in Arkansas who received payment from Standard Fire for physical loss or damage to their dwellings between January 1, 2009 and December 31, 2010, *id.* at 3, 65, excluding various persons, *id.* at 65-66. Attached to Knowles's complaint is a sworn statement by him (the "Stipulation") that he will not seek on behalf of himself or any other individual class member damages in excess of $75,000, or damages in the aggregate in excess of $5,000,000, inclusive of costs and attorneys' fees. *Id.* at 5-6, 74-75.

On May 18, 2011, Standard Fire timely removed the matter to the United States District Court for the Western District of Arkansas. *Id.* at 3, 36-54. On June 6, 2011, Knowles filed a motion to remand, asserting that the amount in controversy did not exceed the $5 million threshold for removal jurisdiction under 28 U.S.C. § 1332(d). *Id.* at 4. On December 2, 2011, the District Court entered an order granting Knowles's motion. *Id.* at 2. In entering its order, the District Court concluded that, although Standard Fire had demonstrated that the aggregated claims in the putative class exceeded $5,000,000, Knowles had properly limited the amount in controversy to $5,000,000 or less through his Stipulation. *Id.* at 10-11, 15.

Thereafter, Standard Fire filed a petition for permission to appeal the District Court's decision with the United States Court of Appeals for the Eighth Circuit. On February 2, 2012, the Court of Appeals issued its decision in *Rolwing v. Nestle Holdings, Inc.*, 666 F.3d 1069 (8th Cir. 2012), concluding that a putative class representative could preclude removal under 28 U.S.C. § 1332(d)(6) by stipulating that the class would not accept damages (inclusive of costs and attorneys' fees) in excess of $4,999,999. Pet. App. 24. On January 4, 2012, the Court of Appeals denied Standard Fire's petition for permission to appeal, *id.* at 1, and on March 1, 2012,

the court denied Standard Fire's petition for rehearing *en banc*. *Id.* at 16. On August 31, 2012, this Court granted certiorari.

SUMMARY OF THE ARGUMENT

In 2005, Congress enacted the Class Action Fairness Act of 2005 ("CAFA"), amending the diversity jurisdiction statute, 28 U.S.C. § 1332, to vest original jurisdiction in the federal district courts over certain class actions in which the amount in controversy exceeds "the sum or value of $5,000,000, exclusive of interest and costs." *Id.* § 1332(d)(2). To ascertain whether the $5 million threshold has been satisfied in any particular case, Congress explicitly required that "the claims of the individual class members shall be aggregated." *Id.* § 1332(d)(6). As the District Court determined, the aggregated claims of the purported class in this case exceed the $5 million threshold.

In order to defeat federal jurisdiction, Knowles offered his Stipulation, purporting to bind all members of the class to his assertion that the class would not accept payment in excess of $5 million. But Knowles could not bind the absent class members in this manner because the class has not yet been certified and Knowles lacked the capacity to speak on their behalf. Knowles's transparent attempt to avoid federal jurisdiction in this way is thus a nullity

on its face. Accordingly, in applying section 1332, the courts below should have aggregated the claims as the statute directs, rather than accept his Stipulation.

But even if the Stipulation was not a nullity on its face, the courts below still should have ignored it and aggregated the claims for purposes of determining their jurisdiction. In enacting CAFA, Congress intended to eliminate the kind of jurisdictional gamesmanship at issue here. As the legislative history reveals, Congress was well aware of the practice of litigants stipulating to artificially reduced amounts in controversy to avoid federal jurisdiction; Congress determined that this practice was abusive; and Congress amended section 1332 to address the abuse in the context of class actions. Specifically, Congress stated flatly in section 1332(d)(6) that, in determining the $5 million amount in controversy, the district court "shall" aggregate the claims. Congress did *not* say that the court shall aggregate the claims unless the litigants stipulate to an amount less than $5 million. Congress stated that the claims shall be aggregated, period. Because the courts below did not follow Congress's directive, this Court should reverse.

ARGUMENT

A. The Plain Language of Section 1332(d)(6) Defeats Knowles's Efforts to Avoid Federal Jurisdiction.

As part of its enactment of CAFA in 2005, Congress amended the diversity jurisdiction statute, 28 U.S.C. § 1332, to vest original jurisdiction in the federal district courts over certain class actions in which the amount in controversy exceeds "the sum or value of $5,000,000, exclusive of interest and costs . . . ." *Id.* § 1332(d)(2). Congress enacted this provision to facilitate the removal "to federal court [of] any sizable class action involving minimal diversity of citizenship." *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2382 (2011). In applying section 1332(d)(2), Congress provided unambiguously that:

> In any class action, the claims of the individual class members *shall be aggregated* to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

28 U.S.C. § 1332(d)(6) (emphasis added).

Congress's use of the term "shall" in section 1332(d)(6) indicates that Congress intended its directive to be mandatory. As this Court has

explained, use of "the mandatory 'shall,' . . . normally creates an obligation impervious to judicial discretion." *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). There is all the more reason to adopt that conclusion here because elsewhere in section 1332, Congress used the term "may" when it wished to vest discretion in the district courts. *See, e.g.*, 28 U.S.C. § 1332(b) (providing that, in certain instances, a district court "may" deny costs to a plaintiff or "may" impose costs on a plaintiff). Where Congress uses the term "shall" in one part of a statute and the term "may" in a different part, the use of the mandatory "shall" is interpreted "to impose discretionless obligations." *Lopez v. Davis*, 531 U.S. 230, 241 (2001); *see also United States ex rel. Siegel v. Thoman*, 156 U.S. 353, 359-60 (1895).

In this case, the District Court determined that Standard Fire satisfied its initial burden of proving by a preponderance of the evidence that the actual amount in controversy, when aggregated, reached, if not exceeded, the minimum $5 million threshold for jurisdiction. Pet. App. 8. The question presented is whether Knowles may, by his Stipulation, artificially circumscribe the amount of the claims. The answer is that he may not.

Regardless of whether Knowles could agree by stipulation to limit the amount of *his*

individual claim to avoid federal jurisdiction, he could not do so in a putative class action lawsuit on behalf of the purported class. Where, as here, there has been no class certification, Knowles could not by stipulation bind the members of the class he did not represent. *See Smith*, 131 S. Ct. at 2381. Because the plain text of CAFA requires the aggregation of Knowles's claim with absent class members to determine whether federal jurisdiction is proper, Knowles alone cannot by stipulation keep the class action out of federal court. To the extent there is any doubt about this, the Court should err on the side of favoring federal jurisdiction and vindicating Congress's clear purposes in enacting CAFA. As stated in the legislative history (discussed in greater detail below), "if a federal court is uncertain about whether 'all matters in controversy' in a purported class action 'do not in the aggregate exceed the sum or value of $5,000,000,' the court should err in favor of exercising jurisdiction over the case." S. REP. NO. 109-14, at 42 (2005).

B. Knowles's Stipulation Is a Nullity, and CAFA Was Intended to Remedy the Very Gamesmanship at Issue Here.

The history of class actions is one of an expanding concept. It is also a history marred by significant potential for systemic abuse. Three forms of abuse are relevant here—inadequate representation, remedial unfairness to plaintiffs and defendants alike, and efforts to manipulate

the amount in controversy to avoid federal court jurisdiction in the removal context.

While the binding nature of class actions is a critical component of their utility, it is also a potential source of harm to the extent it involves a deprivation of the rights of absent class members. That is why this Court has historically emphasized the importance of adequate representation as a necessary precondition to the binding nature of class action litigation. The representation requirement is particularly important in light of the new aggregation requirement in CAFA, because Knowles seeks to bind absent class members to an artificially low stipulated value for their claims prior to certification. That effort conflicts with the historical development of class actions, and the rule that a purported class representative is unable pre-certification to bind a putative class. *See Smith*, 131 S. Ct. at 2381. Knowles's effort also conflicts specifically with Congress's intent in enacting CAFA to prevent plaintiffs from artificially limiting the amount in controversy to avoid federal jurisdiction over removed class action matters. Accordingly, the Court should reverse the decision below.

1. The History of Class Actions

Class actions have deep historical roots, extending back almost a millennium to cases brought before the English chancery courts.

Stephen C. Yeazell, *The Past and Future of Defendant and Settlement Classes in Collective Litigation*, 39 ARIZ. L. REV. 687, 688-90 (1997). In the United States, the class action concept initially evolved in equity as an exception to the necessary party rule. Justice Story first articulated the exception in *West v. Randall*, 29 F. Cas. 718 (C.C.D.R.I. 1820) (no. 17,424) (riding circuit), adopting the view that cases might proceed without joinder of all interested parties

> where the parties are very numerous, and the court perceives, that it will be almost impossible to bring them all before the court; or where the question is of general interest, and a few may sue for the benefit of the whole; or where the parties form a part of a voluntary association for public or private purposes, and may be fairly supposed to represent the rights and interests of the whole; in these and analogous cases, if the bill purports to be not merely in behalf of the plaintiffs, but of all others interested, the plea of the want of parties will be repelled, and the court will proceed to a decree.

Id. at 722.

When the Court ultimately adopted Federal Equity Rule 48 to regulate federal equity cases

and permit representative suits in some matters, it mirrored Justice Story's exception, providing that

> [w]here the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties.

Equity R. XLVIII, 42 U.S. (1 How.) lvi (1843) (Federal Equity Rule 48). As the closing sentence quoted above indicates, however, a decision in a class action would *not* necessarily bind absent parties, and it was not long before courts and legislatures recognized the need for a class action device that would have that effect. Of course, the real question became how that might be accomplished fairly.

The Field Code—the first significant attempt in the United States to replace common law rules of pleading with modern rules of civil procedure—provided a type of binding class ac-

tion device. The relevant provision was fairly simple, requiring only that several parties demonstrate a common interest in law or fact:

> when the question is one of a common or general interest of many persons, or when the parties are very numerous and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

N.Y. CODE CIV. PROC. § 610 (1850) (relevant Field Code provision as adopted in the New York Field Codes); *see also* NEWBERG ON CLASS ACTIONS § 13:2 at 399-400 (4th ed. 2002). Beginning in 1849, numerous jurisdictions adopted the Field Code, giving rise to the modern class action concept. NEWBERG ON CLASS ACTIONS § 13:1 at 399 (4th ed. 2002); S. REP. NO. 109-14, at 6 (2005).

Following the approach taken in the Field Code, this Court effectively abandoned the last sentence of Federal Equity Rule 48 when it noted in *Smith v. Swormstedt* that a decision in a representative suit bound absent class members. 57 U.S. 288, 303 (1853) ("For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree

binds all of them the same as if all were before the court.").[2] In 1912, the Court then borrowed language from the Field Code for its new Federal Equity Rule 38, substantially revising former Rule 48 and effectively harmonizing it with *Smith*. Equity R. 38, 226 U.S. 659 (1912) (Federal Equity Rule 38).[3]

In 1937, the new Federal Rules of Civil Procedure were promulgated, merging law and equity, and adopting Rule 23 as a "substantial restatement of [former] Equity Rule 38." FED. R. CIV. P. 23 adv. cmt. n. to Subdivision (a) (1937).[4]

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[2] Notably, however, the Court stressed the importance of the trial court ensuring that the absentees on both sides were adequately represented. *Id.* at 312-13.

[3] Federal Equity Rule 38 provided that

> [w]hen the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.

Equity R. 38, 226 U.S. 659 (1912).

[4] As initially formulated, Rule 23 provided:

> (*a*) *Representation.* If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all,

Almost immediately, however, the new rule was criticized as too abstract and difficult to apply. *See* Kalven, *supra* note 4, at 695-714; ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY 243-95 (1950). Among other things, it did not specify whether or when absent class members would become bound by a judgment. Kalven, *supra* note 4, at 696.

In 1940, the Court added some clarification in *Hansberry v. Lee*, concluding that persons whose interests had not been adequately represented were not bound by the judgment in a

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> sue or be sued when the character of the right sought to be enforced for or against the class is
>
> (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
>
> (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
>
> (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 696 (1941).

class action. 311 U.S. 32 (1940). Although not decided under Rule 23, the decision focused attention on adequate representation as a key requirement for a binding decision. *Id.* at 41-43, 45-46.

In 1966, Rule 23 was substantially amended, providing specifically that a judgment in a class action would bind absent class members premised on the concept of adequate representation. FED. R. CIV. P. 23 (1966). Under the amended rule, a class action could be brought in federal court if "the claims or defenses of the representative parties [were] typical of the claims or defenses of the class, and . . . the representative parties [would] fairly and adequately protect the interests of the class." *Id.*[5] In this case, of

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[5] As amended in 1966, Rule 23 provided in relevant part that

> **(a) Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a) (1966).

course, Knowles does not yet represent anyone because the class has not yet been certified. Consistent with the historical concern of adequate representation, his effort to bind the class to an artificially manipulated amount in controversy is properly a nullity. *See Smith*, 131 S. Ct. at 2381. For this reason alone, the Court should reverse the decision below.

2. Class Action Expansion and Abuse; Congress's Response in 2005

The amendments to Rule 23 in 1966 were intended to facilitate the use of class actions to advance civil rights litigation. *The Class Action Fairness Act of 1999: Hearings on S. 353 Before the Subcomm. on Administrative Oversight and the Courts of the Senate Comm. of the Judiciary*, 106th Cong. 60-61 (1999) (hereinafter "*Hearings on S. 353*") (Prepared Statement of John P. Frank). As reformulated in 1966, Rule 23 was not intended to be used frequently (if at all) in product liability or mass tort controversies. *Id.* at 65; S. REP. NO. 109-14, at 7 (2005). Underscoring the limited focus of the rule, the drafters expressed "great concern that in mass torts perhaps there should be no class actions at all." *Hearings on S. 353* at 63.

Despite those reservations, beginning in the 1980s, courts began expanding class actions beyond the civil rights context out of concern

that the sheer volume of individual tort cases would clog the judicial system if not resolved through the class action mechanism. S. REP. NO. 109-14, at 7 (2005). A major challenge since then has been to adapt and apply a tool designed to facilitate civil rights litigation for purposes it was never meant to serve. *Id.*

From the outset of its expanded use in the mass tort context, the class action mechanism has been subject to significant abuse. Among other things, lawyers representing plaintiffs in class actions have brought a "flood of class actions in . . . state courts," straining the resources of these courts. S. REP. NO. 109-14, at 13 (2005). Class action filings in state court over the ten years prior to the enactment of CAFA grew more than three times faster than class action filings in federal court—increasing by more than 1,000 percent. *See id.*

Some plaintiffs' lawyers targeted particular state "magnet courts," and in these venues, the number of class action filings filed annually increased by over 3,500 percent. *Id.* According to the Senate Report, this "dramatic explosion" occurred because "some state court judges are less careful than their federal court counterparts about applying the procedural requirements that govern class actions." *Id.* at 14. In addition, state court judges often do not have nearly the same resources as federal judges and often lack

the ability to properly supervise proposed class action settlements. *Id.*

The plaintiffs' class action bar was quick to exploit this situation, and a predictable parade of horribles followed: "lawyers, not plaintiffs, benefit[ed] most from settlements"; "corporate defendants [were] forced to settle frivolous claims to avoid expensive litigation," which drove up consumer prices; "constitutional due process rights [were] ignored in class actions"; and "expensive and predatory copy-cat cases force[d] defendants to litigate the same case in multiple jurisdictions, driving up consumer costs." *Id.* at 14; *see also* 149 CONG. REC. S1873 (daily ed. Feb. 4, 2003) (statement of Sen. Grassley).

Congress's motivation to enact CAFA was driven by a long list of these and other abuses and perceived abuses, including a vast catalogue of cases where plaintiffs' class action attorneys reaped millions in attorneys' fees while the plaintiffs themselves received *de minimis* compensation, *see* S. REP. NO. 109-14, at 14-15 (2005), or nearly worthless promotional coupons to buy more products from the defendants, *id.* at 15-20. The Senate Report also discusses in depth the practice of "judicial blackmail," whereby plaintiffs' attorneys would bring a class action and basically force corporate defendants to settle rather than litigate expensive, frivolous actions. *Id.* at 20.

In Congress's view, this occurs because "state court judges often are inclined to certify cases for class action treatment not because they believe a class trial would be more efficient than an individual trial, but because they believe class certification will simply induce the defendant to settle the case without trial." *Id.* at 20-21; *see also Hearing Before the Subcomm. on Administrative Oversight and the Courts of the Sen. Comm. on the Judiciary*, 106th Cong. 97 (1999) (statement of Prof. E. Donald Elliott). Intense pressure to settle arises because class actions often seek hundreds of millions of dollars in damages, and the ensuing leverage that plaintiffs' attorneys enjoy over defendant corporations, coupled with the promise of hefty attorneys' fees, has encouraged the filing of even more class action suits. S. REP. NO. 109-14, at 20-21 (2005).

Another type of class action abuse discussed in the Senate Report concerns the violation of out-of-state defendants' due process rights. For example, some state court judges have been willing to certify the class even before the defendant has received or has had a chance to respond to the complaint. *Id.* at 21-22. Other state courts have certified classes without regard to whether they meet the requisite certification requirements—sometimes even after federal

courts have already found them to be *un*certifiable. *Id.* at 22-23.

In addition, some plaintiffs' class action lawyers file "copy cat" class action claims asserting similar claims on behalf of essentially the same people, either because they want to take over the lead role from another law firm or because they want to forum shop to find a more malleable judge. *Id.* at 23. When this occurs in different jurisdictions, there is typically no state court mechanism for consolidating or coordinating the cases, resulting in enormous waste and conflict. *Id.*

One potential remedy to these problems in diversity cases has been the longstanding mechanism of removal. Plaintiffs' class action lawyers, however, have developed techniques to avoid removal, and chief among the issues discussed prominently in CAFA's legislative history were "the two most common tactics employed by plaintiffs' attorneys in order to guarantee a state court tribunal . . .: adding parties to destroy diversity and shaving off parties with claims for more than $75,000." *Id.* at 26. As the legislative history reveals, Congress considered manipulations of the amount in controversy to be abusive, *id.*, and specifically targeted them for reform, including the requirement in amended section 1332(d)(6) that claims must be aggregated in determining the $5 million threshold. In addition,

removal is the linchpin of Congress's remedial scheme: the efficacy of Congress's various mechanisms for dealing with many of the abuses outlined above turn on getting a case into federal court. Thus, the ability of a putative plaintiff to manipulate the amount in controversy to avoid federal jurisdiction strikes at the very heart of Congress's efforts.

Among other things, CAFA carefully expanded federal diversity jurisdiction so that truly interstate class action cases could be heard in federal court, specifically amending the removal provisions to make it harder for class action plaintiffs' attorneys to "game the system" by keeping cases out of federal court, and enabling "copycat" cases to be consolidated in a single federal court, *id.* at 27, and providing far greater scrutiny of class action settlements, *id.* at 27-28. In particular, the legislative history reflects Congress's specific intent that CAFA would promote the exercise of diversity jurisdiction and removal by granting federal courts original jurisdiction to hear "interstate class action cases where (a) any member of the proposed class is a citizen of a different state from any defendant; and (b) the amount in controversy exceeds $5 million (aggregating claims of all purported class members, exclusive of interest and costs)." *Id.* at 28.

The amendments to 28 U.S.C. § 1332(d) were intended "to *strongly favor* the exercise of federal diversity jurisdiction over class actions with interstate ramifications." *See* S. REP. NO. 109-14, at 35 (2005) (emphasis added). The amendments also gave federal courts discretion, "in the interests of justice," *id.* at 36, to determine whether to exercise jurisdiction in some situations based on several factors, one of which is "[w]hether the class action has been pleaded in a manner that seeks to avoid federal jurisdiction." *Id.* at 37. If, for example, the plaintiffs have proposed a "class that appears to be gerrymandered solely to avoid federal jurisdiction by leaving out certain potential class members or claims," such that the federal court "concludes evasive pleading is involved, that factor would favor the exercise of federal jurisdiction." *Id.*

Under the specific amendments to section 1332(d)(6) at issue in this matter, individual class members' claims are to be aggregated to determine whether the amount in controversy exceeds $5 million. The legislative history reflects Congress's intent that if a federal court is uncertain about whether "all matters in controversy" in a class action claim exceed, in the aggregate, $5 million, "the court should err *in favor of* exercising jurisdiction over the case." S. REP. NO. 109-14, at 42 (2005) (emphasis added). The amount in controversy is thus to be considered expansively, from either the viewpoint of the de-

fendant or the plaintiff, and regardless of the kind of relief sought. *Id.* Moreover, the Senate Report noted that, in declaratory relief cases, "the federal court should include in its assessment [of the amount in controversy] the value of all relief and benefits that would logically flow from the granting of the declaratory relief sought by the claimants." *Id.* at 43. In sum, the amendments to section 1332(d) were "intended to *expand substantially* federal court jurisdiction over class actions. Its provisions should be *read broadly, with a strong preference that interstate class actions should be heard in federal court* if properly removed by any defendant." *See* S. REP. NO. 109-14, at 43 (2005) (emphases added).

The provisions of CAFA should be interpreted in a manner consistent with the legislation's object and purpose. *E.g., Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979) ("As in all cases of statutory construction, our task is to interpret the words of these statutes in light of the purposes Congress sought to serve."); *see also Johnson v. United States*, 529 U.S. 694, 709 & n.10 (2000) (after noting that Senate Report was "explicit" about congressional purpose, holding that "we . . . have traditionally sought to construe a statute so as to reach results consistent with what Chief Justice Taney called 'its object and policy.'") (quoting *United States v. Heirs of Boisdoré*, 8 How. 113, 122, 12 L. Ed. 1009 (1849)); *Evans v. Jeff D.*, 475 U.S.

717, 744 (1986) (Brennan, J., dissenting) ("We must interpret the statute in the way that is most consistent with Congress' broader purpose; a result which is 'plainly at variance with the policy of the legislation as a whole' . . . cannot be correct.") (quoting *Ozawa v. United States*, 260 U.S. 178, 194 (1922)) (citing *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 56 (1983) (statute should not be interpreted "to produce a result at odds with the purposes underlying the statute" but rather "in a way that will further Congress' overriding objective"); *United States v. Campos-Serrano*, 404 U.S. 293, 298 (1971); *Perry v. Commerce Loan Co.*, 383 U.S. 392, 399-400 (1966); *Lynch v. Overholser*, 369 U.S. 705, 710 (1962); *United States v. Brown*, 333 U.S. 18, 25-26 (1948); *Sorrells v. United States*, 287 U.S. 435, 446 (1932); *United States v. Freeman*, 3 How. 556, 565 (1845)).

The extensive analysis in the Senate Report leaves no doubt that CAFA was enacted to thwart efforts by plaintiffs' class action attorneys to artificially manipulate the $5 million amount-in-controversy requirement. As a general rule, agreements of the parties do not control jurisdiction, especially collusive agreements. *See* 28 U.S.C. § 1359; *Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823, 828-29 (1969). In any event, pre-certification agreements by representative parties simply do not bind the class. Consistent with the legislative history of CAFA, courts

should ignore stipulations of the kind at issue in this case and properly aggregate the claims of the purported class as the statute plainly directs.

CONCLUSION

For the foregoing reasons, as well as those petitioner presents, the decision below should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

FILED
OCT 2 3 2012
OFFICE OF THE CLERK

No. 11-1450

In The Supreme Court of the United States

THE STANDARD FIRE INSURANCE COMPANY,

Petitioner,

v.

GREG KNOWLES, INDIVIDUALLY AND AS CLASS REPRESENTATIVE ON BEHALF OF ALL SIMILARLY SITUATED PERSONS WITHIN THE STATE OF ARKANSAS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF HARTFORD UNDERWRITERS INSURANCE COMPANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, after *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011), when a named plaintiff attempts to defeat a defendant's right of removal under the Class Action Fairness Act of 2005 by filing with a class action complaint a "stipulation" that attempts to limit the damages he "seeks" for the absent putative class members to less than the $5 million threshold for federal jurisdiction, and the defendant establishes that the actual amount in controversy, absent the "stipulation," exceeds $5 million, the "stipulation" is binding on absent class members so as to destroy federal jurisdiction.

CORPORATE DISCLOSURE STATEMENT

Hartford Underwriters Insurance Company is a wholly-owned subsidiary of Hartford Fire Insurance Company, which is a wholly-owned subsidiary of The Hartford Financial Services Group, Inc. ("Hartford Financial"). Hartford Financial is a publicly traded corporation that has no parent corporation. To the best of Hartford Financial's knowledge, no publicly held corporation currently owns 10% or more of its common stock.

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INTEREST OF *AMICUS CURIAE*

Hartford Underwriters Insurance Company ("Hartford") is an insurance company based in Hartford, Connecticut. Its insurance plans and policies include auto, home, and business coverage. It is affiliated with The Hartford Financial Services Group, Inc., one of America's largest investment and insurance companies.[1]

Like many insurance companies, Hartford and its affiliates have been repeat targets of certain class action plaintiffs' lawyers. Hartford and sister companies currently are defending class action and putative class action lawsuits in both federal and state courts. In connection with some of those lawsuits, Hartford has invoked the rights Congress conferred on defendants in the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) ("CAFA"), to remove cases to federal court. And, it has faced attempts by putative class representatives to defeat those rights by purporting to limit potential class recovery to below the $5 million amount-in-controversy threshold. As a result, Hartford has become aware of certain practical and legal nuances relevant to the question before the Court.

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[1] No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. Both Petitioner and Respondent have consented to the filing of this brief.

For example, in *Frederick v. Hartford Underwriters Insurance Co.*, 683 F.3d 1242 (10th Cir. 2012), Hartford removed a putative class action to the U.S. District Court for the District of Colorado. The district court ordered the case remanded to state court but the Tenth Circuit reversed. Among other things, the Tenth Circuit held that once a removing defendant shows that the amount at stake may exceed $5 million, "remand is appropriate only if the plaintiff can establish that it is legally impossible to recover more than" that amount. *Id.* at 1247. The district court later concluded that a class recovery of $5 million was not impossible, because plaintiff's "request" in the prayer for relief portion of his complaint for up to $4,999,999.99 was not a binding limitation under state law. *Frederick v. Hartford Underwriters Ins. Co.*, No. 11-cv-2306-WJM-KLM, 2012 U.S. Dist. LEXIS 141390, at *11-12 (D. Colo. Oct. 1, 2012).

From its experience in CAFA cases, Hartford has gained perspectives on the question presented, and the practicalities of class action litigation that underlie it, which may be of assistance to the Court. And, for the same reasons, Hartford has a substantial interest in ensuring that CAFA's requirements are interpreted and implemented as Congress intended.

SUMMARY OF ARGUMENT

1. As Petitioner explains, stipulations by putative class representatives are irrelevant to how CAFA instructs courts to determine the amount in controversy. Even under the traditional "burden shifting" method for determining the amount in controversy, however, the result is the same. By its nature, the amount in controversy is merely an estimate at the beginning of the case of the amount that potentially will be at stake during the course of the litigation. Once the proponent of federal jurisdiction (whether a plaintiff suing in federal court or a defendant removing to federal court) estimates that the amount at stake exceeds the jurisdictional minimum (and, in the case of a removing defendant, proves any necessary supporting facts by a preponderance of the evidence), federal jurisdiction lies unless the party opposing federal jurisdiction shows to a "legal certainty" that plaintiff cannot recover the necessary amount. *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-89 (1938). In plain terms, the "legal certainty" requirement means that federal jurisdiction exists unless it is *impossible*, as a matter of law, for the plaintiffs to recover the requisite amount. Because, before a court certifies a named plaintiff as class representative, it necessarily *is* possible that the named plaintiff's recovery-limitation strategy will fail (for example, if the trial court refuses to certify him as class representative), purported recovery limitations cannot destroy removal jurisdiction under CAFA.

2. Purported recovery limitations also can fail for the separate and independent reason that they are non-binding under relevant state law. For example, some states do not permit demands for specific sums in complaints, and thus treat purported recovery limitations in complaints as non-binding. These differing state rules provide additional support for Petitioner's argument that stipulations by putative class representatives are irrelevant to the CAFA amount in controversy. To hold otherwise would be to make federal jurisdiction contingent on varying state laws and procedures, with different results in different states, contrary to CAFA's apparent purpose to make the jurisdictional standard uniform. That being said, if the Court were to hold that putative class representatives can, in some circumstances, bind putative class members for purposes of the CAFA amount in controversy, it should refrain from suggesting that such purported limitations *necessarily* destroy federal jurisdiction. Rather, trial courts still would have to consider the particulars of individual purported recovery limitations to determine whether the purported limitations before them make it legally impossible for the putative class to recover $5 million.

ARGUMENT

Hartford agrees with the reasoning and conclusions in the Brief for Petitioner, in particular, its explanation that stipulations by putative class representatives purporting to waive damages on behalf of a

not-yet-certified class can have no effect on CAFA's amount-in-controversy determination. The purposes of this brief are twofold: (1) to explicate the concept of "legal certainty" and (2) to alert the Court to different ways that putative class representatives purport to limit potential class recoveries in attempts to avoid CAFA jurisdiction.

I. UNDER THE *ST. PAUL MERCURY* FRAMEWORK, IF A REMOVING DEFENDANT ESTIMATES THAT THE AGGREGATE OF PUTATIVE CLASS CLAIMS EXCEEDS $5 MILLION, PLAINTIFF MUST SHOW THAT IT IS IMPOSSIBLE FOR THE CLASS TO RECOVER THAT AMOUNT

As Petitioner explains, CAFA instructs courts how to determine the amount in controversy. *See* Brief for Pet. at 11-29. CAFA's methodology differs from the traditional methodology for determining the amount in controversy in non-CAFA diversity cases. *See id.* at 12-13.[2] CAFA directs that "the claims of the

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[2] Effective January 1, 2012, the Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, 125 Stat. 759 (2011), set forth new rules for determining the amount in controversy in non-CAFA cases. Now, in removal cases based on 28 U.S.C. § 1332(a), whatever sum the complaint demands in good faith generally shall be deemed to be the amount in controversy, except if the complaint seeks (1) non-monetary relief or (2) a money judgment, but the pertinent state practice either does not permit demands for a specific sum or permits recovery of damages in excess of the amount demanded, in which case the defendant may assert the amount in controversy

(Continued on following page)

individual class members shall be aggregated" to determine whether those claims exceed $5 million. 28 U.S.C. § 1332(d)(6). Courts simply must add together the potential claims of each individual putative class member – that is, the amounts that each putative class member legally could recover. The classwide recovery a particular named plaintiff chooses to *seek* is beside the point. Accordingly, purported class-recovery limitations by named plaintiffs are jurisdictionally irrelevant.

Even if the Court were to hold that CAFA does not alter the traditional method for determining the amount in controversy, however, the result is the same. That is because under the traditional approach, if a removing defendant shows that the aggregate of individual putative class members' claims exceeds $5 million, federal jurisdiction lies unless it is *impossible*, as a matter of law, for the putative class to recover that amount. And because not-yet-certified class representatives cannot bind absent class members, it necessarily *is* possible at the time of removal that the putative class's recovery will exceed $5 million.

The seminal case for the traditional amount-in-controversy approach is *St. Paul Mercury*, 303 U.S. 283. In substance, that case holds that when a party

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in the notice of removal. *See* 28 U.S.C. § 1446(c)(2). The new rules do not apply to removals under CAFA, whose jurisdictional requirements appear in 28 U.S.C. § 1332(d).

asserts that the amount at stake exceeds the jurisdictional floor, that assertion constitutes the amount in controversy unless the opponent shows it is "legally certain" that the controversy is worth less. *See, e.g., id.* at 288-89 (holding that amount in controversy is based on amount asserted "in good faith" unless it appears "to a legal certainty" that what is at stake "is really for less than the jurisdictional amount").

The plaintiff in *St. Paul Mercury* initially sought damages above the jurisdictional floor. *Id.* at 284-85. As most courts that have addressed the issue have recognized, however, the jurisdictional question is the same when the plaintiff alleges damages below that floor and the removing defendant is the party that believes in good faith that the amount at stake is higher. Whichever party proposes federal jurisdiction, the court should accept as the amount in controversy that party's good faith assessment of how much potentially is at stake (unless it is legally certain that the controversy is worth less). *See, e.g., Frederick*, 683 F.3d at 1247 (defendant is "entitled to present its own estimate of the stakes"; once defendant proves facts supporting estimate over $5,000,000, burden shifts to plaintiff to show to a legal certainty that jurisdictional minimum is not met); *Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830 (7th Cir. 2011) ("[T]he estimate of the dispute's stakes advanced by the proponent of federal jurisdiction controls" unless party seeking remand satisfies legal certainty test); *Bell v. Hershey*, 557 F.3d 953, 956 (8th Cir. 2009) ("Once the removing party has established

by a preponderance of the evidence that the jurisdictional minimum is satisfied, remand is only appropriate if the plaintiff can establish to a legal certainty that the claim is for less than the requisite amount."); *McPhail v. Deere & Co.*, 529 F.3d 947, 954 (10th Cir. 2008) (rejecting "double standard" on removing defendants versus plaintiffs who sue in federal court); *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1412 (5th Cir. 1995) ("[O]nce a defendant is able to show that the amount in controversy exceeds the jurisdictional amount, removal is proper, provided plaintiff has not shown that it is legally certain that his recovery will not exceed the amount stated in the state complaint."); *but see Campbell v. Vitran Express, Inc.*, 471 Fed. Appx. 646, 647 (9th Cir. 2012) (where complaint alleges amount in controversy less than $5 million, defendant must show that it is "legally certain" that the amount in controversy exceeds $5 million); *Morgan v. Gay*, 471 F.3d 469, 474 (3d Cir. 2006) ("The party wishing to establish subject matter jurisdiction has the burden to prove to a legal certainty that the amount in controversy exceeds the statutory threshold."). This approach reflects the common sense principle that, by its nature, the amount in controversy is merely an estimate of how much the plaintiff potentially could recover. *See, e.g., Aetna Cas. & Sur. Co. v. Flowers*, 330 U.S. 464, 468 (1947) ("Nor does the fact that it cannot be known as a matter of absolute certainty that the amount which may ultimately be paid . . . will exceed [the jurisdictional minimum] mean that the jurisdictional amount is lacking."). It would be unfair and impractical at the beginning of a

case to require the proponent of federal jurisdiction (especially a removing defendant) to present more than an estimate. A double-standard directed against defendants, moreover, would undermine "[t]he evident purpose of diversity jurisdiction," which is "to protect out-of-state defendants." *McPhail*, 529 F.3d at 952. That being said, if for some reason the federal-jurisdiction proponent's estimate contains a *fatal legal flaw* that shows plaintiff actually is *precluded* from recovering the jurisdictional minimum, the federal courts logically should not defer to that party's estimate.

In plain terms, under the *St. Paul Mercury* framework, if the proponent of federal jurisdiction states in good faith that the amount at stake exceeds the jurisdictional floor (and supports any necessary facts that do not appear in the complaint with a preponderance of the evidence), then to defeat federal jurisdiction, the opposing party must show that it is *impossible* for the plaintiff to recover the jurisdictional amount. As *St. Paul Mercury* put it, federal jurisdiction lies unless the amount at stake *"really"* – that is, definitely – is less than the jurisdictional threshold because "the plaintiff *cannot* recover the amount claimed." 303 U.S. at 288-89 (emphasis added). Numerous courts have framed the inquiry in this sensible way. *See, e.g., Frederick*, 683 F.3d at 1247 (once defendant proves jurisdictional facts by preponderance of the evidence, remand is appropriate only if plaintiff can establish that it is "legally impossible" to recover more than $5 million); *Rolwing v. Nestle*

Holdings, Inc., 666 F.3d 1069, 1073 (8th Cir. 2012) (legal certainty test met where plaintiff showed it was "legally impossible" for the amount in controversy to exceed $5 million); *Back Doctors*, 637 F.3d at 830 ("[T]he estimate of the dispute's stakes advanced by the proponent of federal jurisdiction controls unless a recovery that large is legally impossible."); *Bell*, 557 F.3d at 959 ("If the [defendants] prove by a preponderance of the evidence that the amount in controversy is satisfied, remand is only appropriate if [plaintiff] can establish that it is legally impossible to recover in excess of the jurisdictional minimum."); *Zellner-Dion v. Wilmington Fin., Inc.*, No. 10-CV-2587 (PJS/JSM), 2012 U.S. Dist. LEXIS 99986, at *14-15 (D. Minn. July 19, 2012) (plaintiff failed to meet legal certainty test because estimate of damages insufficient to show that recovery over $5 million is "legally impossible"); *Thornton v. DFS Servs. LLC*, No. 4:09CV1040 SNLJ, 2009 U.S. Dist. LEXIS 94366, at *2-4 (E.D. Mo. Oct. 9, 2009) (legal certainty test requires party seeking to avoid federal jurisdiction to establish that it is "legally impossible to recover in excess of the jurisdictional minimum").

As Petitioner explains, before a trial court certifies a named plaintiff as class representative, it necessarily remains possible that his or her strategy of trying to avoid federal court by sacrificing potential class recovery through a sub-$5 million recovery limitation will fail. Brief for Pet. at 30-38. For example, the trial court could refuse to certify the named plaintiff as class representative (because of his

decision to sacrifice potential class recovery, or for other reasons), and instead certify someone who would not forgo potential class recovery. This Court need not speculate as to the likelihood of that occurring, because the likelihood necessarily is greater than zero. Pre-certification purported recovery limitations, therefore, *cannot* render it *impossible* for the putative class to recover more than the jurisdictional minimum. Accordingly, such purported limitations cannot defeat federal jurisdiction under traditional amount-in-controversy analysis.

II. SOME PURPORTED RECOVERY LIMITATIONS ARE NON-BINDING UNDER STATE LAW

Purported recovery limitations also might fail to show that it is impossible for the class to recover $5 million for the separate and independent reason that they are not binding under applicable state law. By definition, cases in which CAFA's amount in controversy is relevant are ones in which state law provides the rule of decision; removal jurisdiction under CAFA is a form of diversity jurisdiction. Even if putative class representatives could bind absent members in some cases, therefore, the question would remain whether particular purported sub-$5 million recovery limitations do so effectively under controlling state law (thus making it impossible for the putative class to recover the jurisdictional minimum).

Although Arkansas apparently recognizes as binding the kind of stipulation Respondent offered in the present case, *see* Brief for Pet. at 7, putative class representatives employ a variety of purported-recovery-limitation strategies. Those strategies may or may not bind the plaintiffs who purport to make them, depending on the strategy and the governing state law.

Purported-recovery-limitation strategies vary in at least two ways: by form and by content. With respect to form, plaintiffs' lawyers might attempt to limit class recovery to under $5 million through at least the following:

***Prayers for Relief* (Ad Damnum *Clauses*).** *See, e.g., Frederick*, 683 F.3d at 1248; *Rolwing*, 666 F.3d at 1071; *De Aguilar*, 47 F.3d at 1412; *Stroh v. Colonial Bank, N.A.*, No. 4:08-CV-73 (CDL), 2008 U.S. Dist. LEXIS 89540, at *4-5 (M.D. Ga. Nov. 4, 2008).

Stipulations. *See, e.g., Rolwing*, 666 F.3d at 1071; *Bell*, 557 F.3d at 958; *Basham v. Am. Nat'l County Mut. Ins. Co.*, No. 4:12-CV-04005, 2012 U.S. Dist. LEXIS 126609, at *18-24 (W.D. Ark. Sept. 6, 2012).

Affidavits. *See, e.g., Oshana v. Coca-Cola Co.*, 472 F.3d 506 (7th Cir. 2006); *Parnell v. State Farm Mut. Auto. Ins. Co.*, 173 F.R.D. 446, 447 n.1 (W.D. Ky. 1997); *Thompson v. Apple, Inc.*, No. 3:11-CV-03009-PKH, 2011 U.S. Dist. LEXIS 73861, at *6-8 (W.D. Ark. July 8, 2011).

Interrogatory Responses. *See, e.g., Ambrozich v. Conagra Foods, Inc.*, No. 7:07-107, 2007 U.S. Dist. LEXIS 86448, at *7-8 (E.D. Ky. Aug. 2, 2007).

Class Definitions. *See, e.g., Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 401, 403 (6th Cir. 2007); *Smith v. Unum Life Ins. Co. of Am.*, No. 4:06CV00280JMM, 2006 U.S. Dist. LEXIS 81990, at *7-8 (E.D. Ark. Nov. 6, 2006); *see also Roche v. Country Mut. Ins. Co.*, No. 07-367-GPM, 2007 U.S. Dist. LEXIS 48921, at *11 n.4 (S.D. Ill. July 6, 2007) (stating that plaintiff could avoid federal jurisdiction "by redrafting the class definition, stipulating to certain limitations on the class definition, and so forth").

Other Pleadings Potentially Binding By Operation Of The Doctrine Of Judicial Estoppel. *See, e.g., Rolwing*, 666 F.3d at 1072 (under Missouri law, judicial estoppel prevents plaintiff who disclaims damages above $5 million from accepting damages exceeding that amount); *see also Morgan*, 471 F.3d at 477 n.9 ("We note the potential availability of judicial estoppel arguments by the defendants should the plaintiffs in the future change legal positions in an attempt to achieve an award in excess of $5 million.").

Contracts. *See, e.g., Woodmen of the World Life Ins. Soc'y v. Manganaro*, 342 F.3d 1213, 1217 (10th Cir. 2003) ("[D]ismissal under the legal certainty standard will be warranted . . . when a contract limits the possible recovery. . . .").

Purported recovery limitations also differ in content. Some go so far as to *forswear* recovery greater than $5 million. *Smith v. Nationwide*, 505 F.3d at 403 (plaintiffs expressly limited claims to less than $5 million). Some consist of mere "requests" for up to $5 million. *See, e.g., Frederick*, 683 F.3d at 1245 & 1248. As in this case, some purported recovery limitations consist of promises not to "seek" more than $5 million. *Compare also Boegeman v. Bank Star*, No. 4:12CV1514 JCH, 2012 U.S. Dist. LEXIS 145338, at *5-6 (E.D. Mo. Oct. 9, 2012) (statement in complaint that plaintiffs "will not seek damages" in excess of the jurisdictional minimum insufficient to defeat federal jurisdiction) *with Smith v. Am. Bankers Ins. Co.*, No. 2:11-cv-02113, 2011 U.S. Dist. LEXIS 140881, at *13-14 (W.D. Ark. Dec. 7, 2011) (stipulation that plaintiffs "will not seek" damages above threshold sufficient to defeat federal jurisdiction). Some simply involve statements that the amount at stake is under $5 million. *See, e.g., Probola v. Long & Foster Real Estate, Inc.*, No. 11-6334 (AET), 2012 U.S. Dist. LEXIS 7512, at *5-6 (D.N.J. Jan. 20, 2012) (plaintiffs stated in complaint that "upon information and belief" the amount in controversy was less than $5 million).

The form and content of purported recovery limitations can be decisive as to whether they are binding under state law, and thus whether it is legally impossible for the putative class to recover $5 million. For example, several states provide, through civil procedure rules and/or case law, that certain

kinds of attempted recovery limitations are non-binding; courts accordingly have held that they do not defeat federal jurisdiction. *See, e.g., Bell*, 557 F.3d at 958 (when state law prohibits pleading damages with specificity, an *ad damnum* clause is a "legal nullity" and does not bind plaintiffs to a recovery below the jurisdictional minimum); *Oshana*, 477 F.3d at 511 (citing 735 Ill. Comp. Stat. 5/2-604 (2004)) ("Illinois does not bind plaintiffs to such disclaimers in complaints. . . . [P]laintiffs in Illinois are not limited to the amounts they've requested. So Oshana's disclaimer had no legal effect."); *Ambrozich*, 2007 U.S. Dist. LEXIS 86448, at *7-8 (absent subsequent interrogatory, complaint does not provide any limitation on the amount of damages sought); *see also De Aguilar*, 47 F.3d at 1410 (noting that "[t]he majority of states now . . . have followed the example of Fed. R. Civ. P. 54(c) and do not limit damage awards to the amount specified in the *ad damnum* clause of the state pleading").

Courts also hold that some named plaintiffs' assertions do not *really* purport to limit recovery, because they do not actually disclaim the right to recover the jurisdictional minimum. *See, e.g., In re 1994 Exxon Chemical Fire v. Berry*, 558 F.3d 378, 389 (5th Cir. 2009) ("[P]laintiffs merely alleged that the amount in controversy did not exceed the jurisdictional amount; they did not deny that they would *accept* more.") (emphasis in original); *Aikens v. Microsoft Corp.*, 159 Fed. Appx. 471, 476 (4th Cir. 2005) (plaintiffs' assertion insufficient because it did not "stipulate that the plaintiffs will not *accept* more than

[the jurisdictional amount] if the court awards it") (emphasis in original). As the Seventh Circuit has explained, plaintiffs "cannot have it both ways – [they] cannot disclaim damages in excess of [$5 million] in order to defeat federal jurisdiction but preserve [their] right to recover more than that amount by refusing to admit or stipulate to the jurisdictional limit." *Oshana*, 472 F.3d at 513.

The point is not to attempt to catalog here all the ways plaintiffs' lawyers might attempt to limit class recovery. Nor is it to argue how far putative class representatives must go in disclaiming potential recoveries to avoid federal jurisdiction. It is simply to note that the state-law issue would remain even if this Court were to hold that a putative class representative does not inherently lack the power to bind his or her putative class for purposes of the amount in controversy. This is important for two reasons. First, it bolsters Petitioner's argument that purported classwide recovery limitations are irrelevant to determination of the amount in controversy under CAFA. To hold otherwise would make federal jurisdiction "largely dependent upon the vagaries of state law." *Bell*, 557 F.3d at 958 (quoting *Carlsberg Res. Corp. v. Cambria Sav. and Loan Ass'n*, 554 F.2d 1254, 1261 (3d Cir. 1977)). Such a result would contradict CAFA's purpose and subject defendants within the same circuit to disparate treatment.

Second, the potential for state law to render purported recovery limitations non-binding is something the Court should keep in mind even if it were to

conclude that some purported limitations are relevant under CAFA. For all the reasons above and those in Petitioner's brief, Petitioner has established that putative class representatives *cannot* bind absent class members, and purported class-recovery limitations *cannot* destroy CAFA jurisdiction. If the Court were to disagree with Petitioner on those points, however, the Court should be careful not to suggest that purported recovery limitations by putative class representatives *necessarily* defeat federal jurisdiction. Rather, federal courts considering motions for remand to state court still would have to analyze on a case-by-case basis the particulars of each purported recovery limitation in light of, among other things, relevant state law to determine whether the purported limitations before them make it legally impossible for the putative class to recover $5 million.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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October 29, 2012

AMICUS CURIAE BRIEF

No. 11-1450

FILED
OCT 29 2012
OFFICE OF THE CLERK

In The
Supreme Court of the United States

THE STANDARD FIRE INSURANCE COMPANY,

Petitioner,

v.

GREG KNOWLES, individually and on behalf of all others similarly situated within the State of Arkansas,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF THE MANUFACTURED HOUSING INSTITUTE, AMERICAN NATIONAL PROPERTY AND CASUALTY COMPANY, AMERICAN NATIONAL GENERAL INSURANCE COMPANY, ANPAC LOUISIANA INSURANCE COMPANY, PACIFIC PROPERTY & CASUALTY COMPANY, AND AMERICAN NATIONAL COUNTY MUTUAL INSURANCE COMPANY, AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici are companies not based in Arkansas (and a trade association representing such companies) that have been sued in class actions in the courts of Miller County, Arkansas. They have firsthand experience defending against the tactics of class action lawyers in Miller County. They can explain, from a unique, on-the-ground perspective, the effect of class action lawyers' efforts to prevent out-of-state defendants from removing cases to federal court under the Class Action Fairness Act (CAFA), 28 U.S.C. §§ 1332(d), 1453 (2006 & Supp. I 2012). Amici have experienced many abuses of the class action device described in this brief: forum-shopping, unreasonable discovery demands, judicial unwillingness to address merits issues prior to class certification, attorney gamesmanship, and never-ending delays.

- The Manufactured Housing Institute is a national trade association that represents all segments of the factory-built housing industry. Members of the Institute have been targeted by class actions filed in Miller County. The Institute is interested in protecting the rights of its members and other defendants

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[1] This brief was authored by amici and its counsel listed on the front cover, and was not authored in whole or in part by counsel for a party. No one other than amici or its counsel has made any monetary contribution to the preparation or submission of this brief. Amici have the consent of the parties to file this brief. Letters indicating their consent have been submitted by the parties.

facing large, state court class actions by removing those actions to federal court under CAFA.

• The five ANPAC entities are insurance companies: American National Property and Casualty Company and American National General Insurance Company are Missouri corporations; ANPAC Louisiana Insurance Company is a Louisiana corporation; Pacific Property & Casualty Company is a California corporation; and American National County Mutual Insurance Company is a Texas corporation. These entities were five of 584 defendants included in the nationwide *Hensley* class action pending in Miller County. Plaintiffs claimed the class received less than they were owed in payments on uninsured and underinsured motorist claims. Yet none of these entities insured class members. Three of the five ANPAC entities did not even conduct business in Arkansas; the remaining entities conducted only 2% of their business in Arkansas when the class action was filed. When the ANPAC entities did not settle in *Hensley* – unlike most defendants – they were severed out and sued in the *Basham* class action. Both class actions are discussed in this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This class action arises from Miller County, Arkansas, which is located in the southwestern corner of the state. *See* Beverly J. Rowe, *Miller County,*

Encyclopedia Ark. Hist. & Culture.[2] Its county seat is Texarkana, which straddles the border between Arkansas and Texas. *Id.* Miller County is predominantly rural, and its entire population is less than 45,000 persons. *Id.*

This small, rural county has become fertile ground for class action lawyers. Class action lawyers have worked to establish Miller County as a CAFA-free zone – a safe harbor in which a confluence of litigation tactics and judicial indifference have coalesced to defeat defendants' rights to remove large class actions to federal court. Using Miller County as home base, class action lawyers have dragooned scores of out-of-state corporations into settling cases for vast sums bearing no meaningful relationship to their merits.

CAFA entitles out-of-state defendants to remove certain class actions to federal court. *See* 28 U.S.C. § 1453(b). The class action bar in Miller County and some surrounding jurisdictions seeks to deprive defendants of their removal right by stipulating that the class will not seek more than $5 million in a particular action. The primary issue in this case is whether such a stipulation is effective and lawful. Respondent Knowles included such a stipulation in his complaint when he filed this case in Miller County. Standard Fire removed, contending that Knowles

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[2] Available at http://www.encyclopediaofarkansas.net/encyclopedia/entry-detail.aspx?entryID=790 (last updated Mar. 27, 2012).

actually sought damages exceeding $5 million and that the stipulation was an improper effort to avoid federal jurisdiction under CAFA. The district court and the Eighth Circuit gave effect to the stipulation and determined the case should proceed in state court in Miller County. This court granted the petition for a writ of certiorari to resolve the issue.

This amicus brief does not directly address the propriety of these stipulations. Instead, this brief explains what happens when the class action bar deploys these stipulations to defeat removal jurisdiction. This brief provides the back story to this case – the sordid tale of what is really happening in the trial courts of Miller County. We describe the numerous advantages those courts give to the class action bar. We describe the tactics employed by the class action bar to vex and harass out-of-state defendants into coughing up large settlements (mostly to the benefit of class counsel) simply to escape Miller County.

The stipulation here is one of several devices employed to frustrate the purpose of Congress to reign in abusive class actions in jurisdictions harboring a long history of hostility to out-of-state defendants. To fully appreciate how the class action bar is thwarting Congress's intent, it is necessary to understand what is happening in Miller County.

ARGUMENT

I. CONGRESS INTENDED TO STOP STATE TRIAL COURTS FROM RESOLVING MOST LARGE CLASS ACTIONS BECAUSE THOSE COURTS DID NOT PROVIDE OUT-OF-STATE DEFENDANTS WITH FAIR FORA.

A. CAFA was enacted to protect out-of-state defendants from abusive state court class action practices prevalent in "magnet jurisdictions."

Congress determined that large state court class actions frequently "(A) harmed class members with legitimate claims and defendants that have acted responsibly; (B) adversely affected interstate commerce; and (C) undermined public respect for our judicial system." CAFA, Pub. L. No. 109-2, § 2, 119 Stat. 4. Congress recognized that plaintiffs' lawyers were "gam[ing] the system" to avoid removal of class actions in order to remain in "lawsuit-friendly" state courts. S. Rep. No. 109-14, at 10-12 (2005). Plaintiffs' lawyers had filed disproportionate numbers of class actions in certain "magnet" jurisdictions where "state court judges are less careful than their federal court counterparts about applying the procedural requirements that govern class actions." *Id.* at 13-14; *see also* 151 Cong. Rec. S1225-26 (daily ed. Feb. 10, 2005) (statement of Sen. Vitter) (describing plaintiffs' lawyers "effort[s] to maximize their fees"). Several of these "magnet" jurisdictions were small, rural counties sharing features in common with Miller County, Arkansas. *See id.*

Congress explicitly recognized that these state court class action filings presented a nationwide threat to business and commercial activities requiring a nationwide solution.

First, class actions constitute "judicial blackmail" in plaintiff-friendly jurisdictions. They force out-of-state defendants to enter into large settlements in marginal and frivolous cases. S. Rep. No. 109-14, at 20-21; 151 Cong. Rec. S1225-26 (daily ed. Feb. 10, 2005) (statement of Sen. Vitter) (explaining how the class bar files "cookie-cutter" lawsuits "against major players in a targeted industry" and out-of-town defendants are forced to settle because of the unfavorable actions by local trial judges).

Second, many state courts deprive defendants of basic procedural protections afforded by federal courts. *See* CAFA § 2, 119 Stat. at 4-5; S. Rep. No. 109-14, at 21-24; 150 Cong. Rec. S7709 (daily ed. July 7, 2004) (statement of Sen. Dodd); 151 Cong. Rec. S1333 (daily ed. Feb. 14, 2005) (statement of Sen. Obama) ("when cases are tried in counties only because it's known that those judges will award big payoffs, you get quick settlements without ever finding out who's right and who's wrong").

Third, most such class actions end in settlements where class counsel receive excessive attorney fees and class members receive little or nothing of value. *See* S. Rep. No. 109-14, at 14-20; *see also* 151 Cong. Rec. S1225-26 (daily ed. Feb. 10, 2005) (statement of Sen. Vitter).

Finally, Congress noted that class action counsel played games with the prior requirement that each class member have claims in excess of $75,000. *See* S. Rep. No. 109-14, at 10-11 ("[C]lass action lawyers typically misuse the jurisdictional threshold to keep their cases out of federal court. For example, class action complaints often include a provision stating that no class member will seek more than $75,000 in relief, even though they can simply amend their complaints after the removal to seek more relief and even though the class action seeks millions of dollars in the aggregate.").

B. CAFA embodies the constitutional concern for supplying out-of-state defendants with fair fora.

In enacting CAFA, Congress sought to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." CAFA § 2(b), 119 Stat. at 5; *see also* S. Rep. No. 109-14, at 6 ("This Committee believes that the current diversity and removal standards as applied in interstate class actions have facilitated a parade of abuses, and are thwarting the underlying purpose of the constitutional requirement of diversity jurisdiction"); 151 Cong. Rec. S1235 (daily ed. Feb. 10, 2005) (statement of Sen. Sessions) (arguing that CAFA is consistent with the Founders' views that out-of-state defendants should be protected from the "home cooking" of state courts).

Chief Justice Marshall observed that the Constitution "established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states" because of the Framers' "apprehensions" that "the tribunals of the states will administer justice as impartially as those of the nation." *Bank of the U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809); *see also Burgess v. Seligman*, 107 U.S. 20, 34 (1883) ("[T]he very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states was to institute independent tribunals, which, it might be supposed, would be unaffected by local prejudices and sectional views"); Joseph Story, *Commentaries on the Constitution* § 1684 (1833) (diversity jurisdiction provides noncitizens with "national and impartial" tribunals).

Congress was well aware of the unfair treatment defendants in large class actions had received in many state courts, and it expanded the diversity jurisdiction in enacting CAFA to ensure that those defendants had access to a neutral forum.

C. Miller County is one of the "magnet jurisdictions" targeted by CAFA.

The percentage of Miller County lawsuits alleging tort claims – the claims around which most class

actions revolve[3] – far outpaces the national average. Across the nation, tort filings make up 5% of civil cases in state courts. Nat'l Ctr. for State Courts, *Civil Caseload Composition,* Court Statistics Project.[4] But in Miller County, tort cases make up 13.7% of all filings, between double and triple the comparable percentage of tort actions filed nationwide. *See* Ark. Judiciary, *Civil Caseload Summary 2010,* 31-32 (2012).[5]

Roughly 7,500 class actions are filed nationwide each year, which amounts to one class action for every 41,333 mericans. Deborah R. Hensler, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 Geo. Wash. L. Rev. 306, 308 n.7 (2011). In Miller County, however, in 2011, class counsel for respondent Knowles alone filed at least one class action for every 8,692 residents. *Cf.* Rowe, *supra;* with Appendix 1, *infra* (together with *Basham*, showing a partial list of 2011 class actions

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[3] Francis E. McGovern, *Class Actions and Social Issue Torts in the Gulf South*, 74 Tul. L. Rev. 1655, 1657-59 (2000). Respondent Knowles has sued petitioner on a breach of contract theory for allegedly failing to pay general contractors' overhead and profit, *see* Pet. App. 69a-70a, but class action lawyers in Miller County have pleaded tort theories alleging the same failures, *see, e.g., infra* at 11 & n.7.

[4] Available at http://www.courtstatistics.org/civil/civilcomposition (last visited Oct. 18, 2012).

[5] Available at http://courts.arkansas.gov/10_cal_report/index.cfm (last visited Oct. 18, 2012).

filed in Miller County by the same class counsel representing Knowles).

Both the disproportionate number of tort filings, as well as the unfair practices employed by the trial courts in Miller County (discussed *infra*), have caused observers to identify Miller County as a state-court "magnet" jurisdiction that exemplifies the problems Congress sought to fix through CAFA. Nan S. Ellis, *The Class Action Fairness Act of 2005: The Story Behind the Statute,* 35 J. Legis. 76, 93 n.115 (2009) (noting Miller County is one of "the most famous magnet jurisdictions"); *see also* Am. Tort Found., *Judicial Hellholes 2006*, at 22 (2006) ("Miller County hosts more tort cases relative to its population than any other county in the state. . . . Miller County also appears to host more than its fair share of major class action lawsuits. . . . Miller County also is home to large awards and unfair rulings. . . . Not surprisingly, the legal environment in Miller County has led companies to settle rather than risk going to trial. . . . Of course, when [a recent major class action] settled for $90 million this year, $30 million went to the Miller County lawyers while the plaintiffs received zero cash – just coupons toward future advertising."); Inez H. Friedman-Boyce, *Head's Up on the Class Action Fairness Act of 2005,* 49 Bos. B.J. 6 (Sept./Oct. 2005)

(noting Miller County is a "magnet jurisdiction" for class action filings).[6]

II. IN MILLER COUNTY, THE CLASS ACTION BAR EMPLOYS SEVERAL INTERRELATED STRATEGIES TO COERCE LARGE SETTLEMENTS WHILE DEPRIVING DEFENDANTS OF THEIR CAFA REMOVAL RIGHTS.

A. Miller County courts refuse to intercede when class action lawyers make abusive discovery requests.

Defendants in Miller County class actions are commonly subject to inappropriate and burdensome discovery with no meaningful relief available from trial or appellate courts. *See Chiodini v. Lock*, 281 S.W.3d 728, 732 (Ark. 2008) ("This court has further held that discovery matters are not amenable to interlocutory review."); John O'Brien, *Insurers: Keeping Class Action in Arkansas Will Force Settlement*, Legal News Line, Apr. 3, 2012;[7] Michelle Massey,

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[6] *Basham v. Am. Nat'l Cnty. Mut. Ins. Co.*, No. 12-8018 (8th Cir. filed Sept. 17, 2012) and *Goodner v. Clayton Homes, Inc.*, No. 12-8021 (8th Cir. filed Sept. 20, 2012) are class actions currently pending in the Eighth Circuit that involve the same issues as *Knowles*. Both cases arise from the same state judicial district as this case. These cases are not included on the chart in Appendix 1 showing recent class action filings.

[7] Available at http://www.legalnewsline.com/class-action/235713-insurance-keeping-class-action-in-arkansas-will-force-settlement.

Arkansas "Click Fraud" Class Action Settled, Southeast Texas Record, May 8, 2008.[8]

The discovery requests often impose peculiarly onerous burdens and unnecessarily high costs on defendants. *See id.*; *cf., e.g.*, Defendants' Motion for a Protective Order Regarding Plaintiffs' Notice of Deposition of Chief Executive Officer Tom Wilson at 8-18, *Feely v. Allstate Cnty. Mut. Ins. Co.*, No. CV-2004-294-3A (Miller Cnty. Cir. Ct. Apr. 20, 2010); Letter from Circuit Judge Kirk D. Johnson to Hawley Holman and John Goodson, Counsel for Allstate Cnty. Mut. Ins. Co. (May 11, 2010), (together, ordering the deposition, in Miller County, of Allstate's CEO Thomas Wilson, though he lacked information on pertinent issues and several Allstate employees with superior knowledge had already testified); Defendants' Status Report on Discovery at 9-10, *Meredith v. Clayton Homes, Inc.*, No. CV-2005-72-2 (Miller Cnty. Cir. Ct. May 22, 2008) (describing how defendants had to open their IBM mainframe computer and furnish a user account to plaintiffs' counsel, and pay more than $1.4 million, to comply with court-ordered follow-up discovery).

Class action lawyers' discovery demands are often so broad that they include requests not "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Because Miller

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[8] Available at http://www.setexasrecord.com/news/212088-arkansas-click-fraud-class-action-settled.

County courts do not sufficiently police plaintiffs' discovery requests, defendants must then spend extraordinary and unnecessary sums to comply with those requests. If class action lawyers were not evading removal under CAFA, federal district courts would be limiting these unduly burdensome discovery requests. *See* Fed. R. Civ. P. 26(b)(2)(C).

Several examples serve to illustrate the problem. Like petitioner Standard Fire in this case, Farmers Insurance Co. is one of many insurance companies that has been sued for allegedly failing to account for general contractors' overhead in paying homeowners' claims. Michelle Massey, *Farmers Seeks Bond to Cover Discovery Costs in Arkansas Class Action*, Southeast Texas Record, Feb. 25, 2010.[9] The class action against Farmers was filed in 2004, and Farmers filed motions seeking a protective order and certain limits to the discovery demanded by plaintiffs. *Id.* The trial court declined to rule on Farmers' motions for six years. *Id.* During that time, Farmers estimated it incurred at least $6 million in costs attempting to produce millions of pages of documents in a unique format. *Id.*

In the same case, class action lawyers demanded copies of all of the claims files of Foremost Insurance Company Inc. stretching back to 1996. Michelle Massey, *Class Counsel Attempts to Disqualify Defense*

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[9] Available at http://www.setexasrecord.com/news/225007-farmers-seeks-bond-to-cover-discovery-costs-in-arkansas-class-action.

Attorney in Foremost Insurance Case, Southeast Texas Record, Mar. 13, 2008.[10] Foremost objected that complying with this demand would require it to devote thousands of attorney hours to reviewing and redacting more than 600,000 individual claim files, at a cost that might exceed $45 million. *Id.* In response, the Miller County court ordered Foremost to produce the claims files *without* redactions and *within* 10 days. *Id.* The court later allowed plaintiffs to select sample claims files from a complete list furnished by Foremost, *id.*, but the court did not indicate that was the end of the matter, so Foremost had no choice but to conduct the full review it had sought to avoid. And even as the court afforded the class action lawyers nearly unlimited discovery, it denied Foremost's straightforward request to inspect the named plaintiff's property, the subject of the lawsuit. Michelle Massey, *"Failure to Communicate" Could Lead to $45M in Discovery Costs*, Southeast Texas Record, Aug. 8, 2007.[11]

In yet another example, a trial court rejected multiple insurance companies' requests for a protective order permitting them to redact personal information (such as financial and health information) from the hundreds of thousands of individual claims

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[10] Available at http://www.setexasrecord.com/news/209240-class-counsel-attemps-to-disqualify-defense-attorney-in-foremost-insurance-case.

[11] Available at http://www.setexasrecord.com/news/198990-failure-to-communicate-could-lead-to-45-m-in-discovery costs.

files required to be produced. Michelle Massey, *"Colossus" Class Action Costing Defendants More Than $293 Million,* Legal News Line, Aug. 2, 2007.[12]

Another vexing problem arises for out-of-state defendants with meritorious objections to personal jurisdiction. The Miller County courts have ruled that a defendant waives its objection to personal jurisdiction by seeking a protective order in discovery. *See, e.g.*, Order on Motion to Dismiss at 7, *Hensley v. Computer Sciences Corp.*, No. CV-2005-059-3 (Miller Cnty. Cir. Ct. Aug. 29, 2008). Yet the courts often do not schedule hearings on motions challenging personal jurisdiction until long after the defendant has been sued, and merits discovery proceeds in the meantime. *See, e.g.,* Initial Scheduling Order at 2-3, *Basham v. Am. Nat'l Cnty. Mut. Ins. Co.*, No. 2005-59-3A (Miller Cnty. Cir. Ct. Sept. 16, 2011) (setting a hearing date on personal jurisdiction motions eight months hence). Thus, in a cruel irony, the defendant has no choice but to participate in costly (and entirely unnecessary) discovery in order to preserve the argument that it cannot be sued in Miller County in the first place.

Burdensome and expensive discovery is often unreasonable. But it is particularly unreasonable when the expense is so disproportionate to the amount in controversy. Mandating the expenditure of millions of

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[12] Available at http://www.setexasrecord.com/news/198752-colossus-class-action-costing-defendants-more-than-293-million.

dollars in discovery when plaintiffs have stipulated to seek less than $5 million is financially irrational.

The practical effect of this crushingly expensive discovery has been to force defendants to settle class actions before they can obtain rulings on class certification or the merits of claims and defenses. *See* Michelle Massey, *Sanctioned Insurance Company Petitions Arkansas Supreme Court,* Southeast Texas Record, Dec. 29, 2009.[13] In this environment, it is immaterial whether defendants have meritorious objections to class certification or valid defenses to liability. Many defendants in Miller County have reached the point where it is simply too expensive to try to vindicate themselves.

B. Although class action lawyers have stipulated not to seek more than $5 million, they have recovered staggering attorney fees in recent class actions.

Respondent Knowles contends that he may stipulate to seek less than $5 million, even if the class he wants to represent might otherwise be eligible for a greater recovery. But the experience in Miller County shows that such stipulations are illusory. Recent settlements have required defendants to pay class action lawyers far more than $5 million in attorney fees alone. *See* O'Brien, *supra*.

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[13] Available at http://www.setexasrecord.com/news/223896-sanctioned-insurance-company-petitions-arkansas-supreme-court.

Although exact figures are difficult to obtain because of the absence of electronic dockets, at least twenty-three class actions have settled in Miller County in the last few years. In those cases, the class action lawyers sought and were granted nearly $400 million in fees based solely on their own estimates of the potential value of the settlements to class members. *See infra* Appendix 2.[14] These settlements were crafted in cases filed before CAFA's enactment, but the cases nonetheless included damages stipulations under then-applicable law (purporting to confine each class member's claims to $75,000, including fees). *See* Appendix 2, Excerpts from Notice of Removal, *Goodner v. Clayton Homes, Inc.*, No. 12-4001 (W.D. Ark. Jan. 6, 2012), ECF No. 1, at 17-21 (showing a partial list of class action settlements in class actions brought by the same class action counsel involved in this case).

Respondent Knowles and plaintiffs in other post-CAFA cases have stipulated they will not seek more than $5 million for their classes (including fees). But recent history in Miller County teaches that settlements will inevitably exceed the stipulated amounts because defendants must settle to avoid endless

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[14] Class action counsel have never fully documented how much class members have actually received in prior class action settlements. *See, e.g., Big Money for Lawyers*, Ark. Times, Dec. 14, 2011, www.arktimes.com/arkansas/big-money-for-lawyers/content?oid=1974950.

litigation and prohibitively expensive (and largely unnecessary) discovery.

Moreover, as is the case here, class action lawyers have defined the class period to include only part of the relevant statute of limitations period. *See, e.g.*, Pet. App. 47a-48a. This leaves open the possibility that class action lawyers will later sue the same defendant on the same theory, this time by defining the class period as the remaining years of the statute of limitations period.

There are several incentives for class action lawyers to employ this artifice. Class action lawyers cannot file class actions seeking more than $5 million without exposing the class to CAFA removal, so in an effort to remain in federal court they stipulate to seek less than $5 million. But class action lawyers do not want to limit their recovery to $5 million for any particular controversy, so they splice what should be a single class into artificial units, for example, segments of a statute of limitations period. Class action lawyers then file multiple class actions corresponding to the segments of the statute of limitations period, each one purporting to seek less than $5 million. By stipulating and splicing in this fashion, class action lawyers continue to seek and obtain (in the aggregate) settlements far greater than CAFA's removal threshold. For an individual defendant, the specter of serial class actions, each alleging the same theory of wrongdoing, imposes intolerable and unwarranted settlement pressure.

C. Miller County trial courts favor class action lawyers in their inconsistent rulings.

While defense motions can linger undecided for years (*see infra* at 20-22), trial courts will often entertain plaintiffs' motions quickly. *See* Michelle Massey, *Reporter Asked to Leave Hearing in Colossus Class Action*, Southeast Texas Record, May 16, 2008.[15]

Similarly, while trial courts allow class action counsel to obtain most discovery material they request, trial courts typically reject defendants' efforts to obtain even basic discovery material from plaintiffs. For example, in *Basham v. Computer Sciences Corp.*, No. CV-2005-59-3A, order at 4 (Miller Cnty. Cir. Ct. Sept. 16, 2011) (order denying motion for leave to serve written discovery), a defendant sought discovery to determine the adequacy of putative class representatives and class counsel. Among other things, the defendant sought to examine prior settlements that had provided huge payouts to class action counsel in order to assess the benefits actually provided to class members. This information was also relevant to assessing mitigation of damages, offset, and joint and several liability issues. The trial court found that the discovery could not be relevant because the court had previously approved those settlements as fair. *See id.* at 7-10. The court added that it had denied

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[15] Available at http://www.setexasrecord.com/news/212470-reporter-asked-to-leave-hearing-in-colossus-class-action.

defendants' ability to serve interrogatories regarding prior settlements in related class actions in Miller County filed by the same class action counsel and that it adhered to strict discovery limitations on defendants. *Id.* at 10-11.

In short, while plaintiffs can obtain almost any discovery they want, defendants cannot secure basic discovery on critical issues for their defenses.

D. Arkansas class action law deviates from federal class action law in ways that afford class action lawyers tactical advantages in Miller County.

Federal law requires trial courts (before certifying a class) to engage in "a rigorous analysis" to confirm that the prerequisites in Fed. R. Civ. P. 23 are satisfied. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982). Arkansas has rejected that approach, *Lenders Title Co. v. Chandler*, 107 S.W.3d 157, 162 (Ark. 2003), and has replaced it with a strong predisposition in favor of class certification – a "'certify now, decertify later' approach," *Farmers Union Mut. Ins. Co. v. Robertson*, 370 S.W.3d 179, 187 (Ark. 2010). And while federal law compels an examination of merits questions that bear upon the issue of certification, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551-52 (2011), the Arkansas Supreme Court has "repeatedly held that we will not delve into the merits of a case when reviewing an order denying

or granting class certification," *THE/FRE, Inc. v. Martin*, 78 S.W.3d 723, 728 (Ark. 2002).

Class action lawyers in Miller County have manipulated the merits rule to pernicious effect. They have argued, and the Miller County courts have accepted, that this rule forbids a trial court from considering *any* motion addressing the merits until *after* the court has resolved the certification issue. *See, e.g.*, *Basham v. Am. Nat'l Cnty. Mut. Ins. Co.*, No. 2005-59-3A (Miller Cnty. Cir. Ct. Oct. 24, 2011) (order granting plaintiff's motion to defer) (refusing, in October 2011, to rule on defense motions to dismiss a class action, filed in 2008, because class certification had not yet been adjudicated); Michelle Keahey, *Judge in Ark. Colossus Class Action Did Not "Play,"* Legal News Line, Apr. 25, 2012.[16] This means that a defendant with a valid motion to dismiss, or a comparable dispositive legal argument, cannot even be heard on that matter prior to class certification.

The case of Charles Loper, Jr., and his financial planning company illustrates the problem. *See* Marilyn Tennissen, *Owner Says $1M Spent to Defend Frivolous Suit Against Estate-Planning Companies*, Southeast Texas Record, Aug. 24, 2012.[17] In 2007, three

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[16] Available at http://www.legalnewsline.com/in-the-spotlight/235935-judge-in-ark-colossus-class-action-did-not-play.

[17] Available at http://www.setexasrecord.com/news/246307-owner-says-1m-spent-to-defend-frivolous-suit-against-estate-planning-companies.

Texarkana residents filed a class action against numerous estate planning companies alleging they were duped into buying useless living trusts. *Id.* Loper and his company were named as defendants, along with numerous others. *Id.* Loper and his company spent $1 million in legal fees and five years in litigation. Finally, class representatives admitted they had no idea why Loper and his company had been included in the class action and they were dismissed as defendants. *Id.*

E. Class action lawyers shop for the forum that will avoid an examination of the merits. They also delay resolution and impede defendants' rights through tactical severance.

In November 2011, plaintiffs in a class action in Sebastian County, Arkansas, who challenged insurers' use of a claims adjustment software called Colossus amended their complaint to add numerous additional insurance companies. Keahey, *supra*. Defendants moved to dismiss the claims. *Id.* Class action counsel sought to delay a ruling on these motions, arguing it was improper to rule on dispositive motions until after a class certification motion could be resolved (an argument the Miller County trial courts typically accept). *Id.* But the Sebastian County judge refused. *Id.* The class action lawyers then voluntarily dismissed the class action and refiled the same class action in Miller County one hour and 43 minutes later. *Id.*

In another recent class action filed in Miller County, when defendants removed the case to federal court under CAFA, class action counsel voluntarily dismissed the complaint so it could be refiled in state court with fewer causes of action. *Thatcher v. Hanover Ins. Grp., Inc.*, 659 F.3d 1212, 1213 (8th Cir. 2011). The Eighth Circuit intervened and reversed, noting that "we have repeatedly stated that it is inappropriate for a plaintiff to use voluntary dismissal as an avenue for seeking a more favorable forum." *Id.* at 1214; *see id.* at 1215 (decrying plaintiffs' "improper forum-shopping measure"). On remand, the federal district court saw through class counsel's forum-shopping efforts:

> [P]laintiff has not provided to the Court any good reason why it wants to voluntarily dismiss its case, re-file in state court and eliminate the first three counts stated in his amended complaint (unjust enrichment, fraud and constructive fraud). The obvious reason – as admitted by plaintiff in his presentations – is to avoid removal of the class action to federal court upon it being re-filed as a breach of contract action only. That clearly amounts to improper forum shopping and the analysis need proceed no further. . . . [Plaintiff and his attorneys] are not to be permitted to shop for a new and hopefully more favorable forum if it turns out that their complaint – as drawn – places them in a court not of their liking.

Thatcher v. Hanover Ins. Grp., Inc., No. 10-4172, 2012 WL 1933079, at *11 (W.D. Ark. May 29, 2012).

Another example of forum-shopping involves suing the same defendant multiple times in multiple jurisdictions. In *Meredith v. Clayton Homes, Inc.*, No. CV-2005-72-2 (Miller Cnty. Cir. Ct., dismissed May 29, 2009), class action counsel settled a case, and the court approved a settlement with $15 million in fees for class action counsel. Plaintiffs fully released their claims as part of the settlement. Yet a short time later, class action counsel filed a new class action in a neighboring jurisdiction against the same defendant on behalf of named plaintiffs who had released their claims in the prior settlement. *See* Pet. for Permission to Appeal at 5, *Goodner v. Clayton Homes, Inc.*, No. 12-8021 (8th Cir., filed Sept. 20, 2012).

After finding a favorable forum – typically in Miller County – class action lawyers have also severed one or more defendants for tactical effect. Severed defendants lose their ability to protect the use of confidential documents they produced in the initial action; Miller County courts rule that severed defendants lack "standing" to protect those materials in the original case. Michelle Massey, *Insurance Companies Respond to Colossus Class Action Severance*, Southeast Texas Record, June 26, 2008;[18] *see also* Brief in Support of Motion to Enforce Protective Order at 1, *Hensley v. Computer Sciences Corp.*, No. CV-2005-59-3 (Miller Cnty. Cir. Ct. Aug. 13, 2008).

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[18] Available at http://www.setexasrecord.com/news/213524-insurance-companies-respond-to-colossus-class-action-severance.

The trial court then treats the severance as restarting the clock on the newly-severed case, creating further delays before dispositive defense motions can be heard. *Insurance Companies Respond to Colossus Class Action Severance*, *supra*.

After severing defendants in the Colossus case described above, and adding a new plaintiff, the trial court refused to move the new case forward, sitting for two years on various motions including a motion requesting nothing more than a scheduling order. Michelle Massey, *Last Defendant in Colossus Class Action Awaits Judge's Rule on Motions,* Southeast Texas Record, Mar. 15, 2010.[19] The class action lawyers also waited many months, "for 'strategic reasons,'" before notifying defendants that the newly-added plaintiff, James Basham, had died. ANPAC Defendants' Response in Opposition to Motion for Substitution of Parties at 2, *Basham v. Computer Scis. Corp.*, No. CV-2005-59-3A (Miller Cnty. Cir. Ct. Oct. 20, 2010).

CONCLUSION

The ills that Congress identified and sought to remediate in CAFA remain present in numerous state court "magnet" jurisdictions across the Nation. Nowhere are these ills more deeply rooted than in Miller

[19] Available at http://www.setexasrecord.com/news/225360-last-defendant-in-colossus-action-awaits-judges-rule-on-motions.

County, as this brief demonstrates. The Congressional purpose behind CAFA will fail if class action lawyers remain free to evade federal jurisdiction by suing in state courts unconcerned with their tactics. This Court should emasculate those tactics, and uphold Congress's purpose, by adopting the petitioner's position and by authorizing removal notwithstanding a damages stipulation.

Respectfully submitted,

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APPENDIX 1

Excerpts from Notice of Removal,
***Goodner v. Clayton Homes, Inc.*, No. 12-4001**
(W.D. Ark. Jan. 6, 2012), ECF No. 1 at 22-25.

Case 4:12-cv-04001-SOH Document 1
Filed 01/06/12 Page 1 of 42 PageID #: 1

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION**

THOMAS GOODNER, and LINDA GOODNER, individually and On Behalf of a Class of All Other Similarly Situated Individuals; Plaintiffs, v. CLAYTON HOMES, INC., CMH HOMES, INC., and VANDERBILT MORTGAGE & FINANCE, INC.; Defendants.	)	Case No. 12-4001

NOTICE OF REMOVAL

(Filed Jan. 6, 2012)

* * *

40. In 2011 alone, Plaintiffs' counsel filed more than 25 class action complaints that purport to stipulate to damages below $5 million in order to try to evade federal jurisdiction. As evidenced by the chart below, the damage cap in this Complaint is nothing more than a thinly veiled scheme to evade Congress' decision to open federal courts to defendants in large, interstate class actions.

NON-EXHAUSTIVE LIST OF RECENT ARKANSAS STATE COURT CLASS ACTION COMPLAINTS FILED BY *GOODNER* PLAINTIFFS' COUNSEL[69]

CASE STYLE	DOES THE COMPLAINT PURPORT TO CAP DAMAGES?
Thompson v. Apple, Inc., Case No. CV-2011-2 (Circuit Court of Carroll County, Ark.)	Yes[70]
Tomlinson v. Skechers, U.S.A., Inc., Case No. CV 11-1217 (Circuit Court of Washington County, Ark.)	Yes[71]
Tomlinson v. FitnessIQ, LLC Civil Action No. CV-11-239-2 (Circuit Court of Washington County, Ark.)	Yes[72]

[69] This non-exhaustive list is based on a review of court filings in certain Arkansas counties conducted during the short time period after service of the Complaint in this civil action and before removal. The list is non-exhaustive because many Arkansas counties, such as Miller County, do not have an on-line database of their cases so there is not a practicable way to search for all cases in which the *Goodner* plaintiffs' counsel have filed Arkansas state court class action complaints.

[70] Exhibit 62 hereto.

[71] Exhibit 63 hereto.

[72] Exhibit 64 hereto.

Tomlinson v. Reebok International, LTD., Case No. CV-11-122-6 (Circuit Court of Washington County, Ark.)	Yes[73]
Knowles v. The Standard Fire Insurance Co., Case No. CV-2011-0239-3 (Circuit Court of Miller County, Ark.)	Yes[74]
Smith v. American Bankers Insurance Co. of Florida, Case No. CV 2011-259-I (Circuit Court of Crawford County, Ark.)	Yes[75]
Thatcher v. The Hanover Insurance Group, Inc., Case No. CV-2010-527-1 (Circuit Court of Miller County, Ark.)	Yes[76]
Overby v. L. A. Gear, Inc. Case No. CV 11-238-2 (Circuit Court of Washington County, Ark.)	Yes[77]

[73] Exhibit 65 hereto.

[74] Exhibit 66 hereto.

[75] Exhibit 67 hereto.

[76] Exhibit 68 hereto.

[77] Exhibit 69 hereto.

Overby v. ACI Internatioanl [sic], *Inc.*, Case No. CV-11-2201-6 (Circuit Court of Washington County, Ark.)	Yes[78]
Brady v. Collective Brands, Case No. CV-11-237-4 (Circuit Court of Washington County, Ark.)	Yes[79]
Brady v. Payless Shoe Source, Inc., Case No. CV-11-2200-6 (Circuit Court of Washington County, Ark.)	Yes[80]
Stagg v. New Balance Athletic Shoe, Inc., Case No. CV-11-241-2 (Circuit Court of Washington County, Ark.)	Yes[81]
Baxter v. Skype, Inc. Case No. CV-11-56-4 (Circuit Court of Washington County, Ark.)	Yes[82]

[78] Exhibit 70 hereto.

[79] Exhibit 71 hereto.

[80] Exhibit 72 hereto.

[81] Exhibit 73 hereto.

[82] Exhibit 74 hereto.

Baxter v. BuySafe, Inc. Case No. CV-11-60-7 (Circuit Court of Washington County, Ark.)	Yes[83]
Baxter v. Kia Motors America, Inc. Case No. CV-11-53-4 (Circuit Court of Washington County, Ark.)	Yes[84]
Baxter v. Philips Electronics North America Corporation Case No. CV-11-54-4 (Circuit Court of Washington County, Ark.)	Yes[85]
Baxter v. ShopLocal, LLC Civil Action No. CV-11-61-7 (Circuit Court of Washington County, Ark.)	Yes[86]
*Desiree Beam v. E*Trade Financial Corporation* Civil Action No. CV-11-64-4 (Circuit Court of Washington County, Ark.)	Yes[87]

[83] Exhibit 75 hereto.

[84] Exhibit 76 hereto.

[85] Exhibit 77 hereto.

[86] Exhibit 78 hereto.

[87] Exhibit 79 hereto.

Forrest v. C3 Metrics, Inc. Civil Action No. CV-11-62-2 (Circuit Court of Washington County, Ark.)	Yes[88]
Forrest v. YouTube, LLC Civil Action No. CV-11-55-2 (Circuit Court of Washington County, Ark.)	Yes[89]
Hague v. American Sporting Goods Corp. Civil Action No. CV-11-240-2 (Circuit Court of Washington County, Ark.)	Yes[90]
Kimbrough v. Nordstrom, Inc. Civil Action No. CV-11-57-4 (Circuit Court of Washington County, Ark.)	Yes[91]
Kimbrough v. Pandora Media, Inc. Civil Action No. CV-11-63-4 (Circuit Court of Washington County, Ark.)	Yes[92]

[88] Exhibit 80 hereto.

[89] Exhibit 81 hereto.

[90] Exhibit 82 hereto.

[91] Exhibit 83 hereto.

[92] Exhibit 84 hereto.

Nguyen v. Metacafe, Inc. Civil Action No. CV-11-51-4 (Circuit Court of Washington County, Ark.)	Yes[93]
Pinkelton v. Mattel, Inc. Civil Action No. CV-10-4012-4 (Circuit Court of Washington County, Ark.)	Yes[94]
Roller v. TV Guide Online Holdings, LLC Civil Action No. CV-11-52-4 (Circuit Court of Washington County, Ark,)	Yes[95]
Oliver v. Mona Vie, Inc., Case No. CV-2010-644-1 (Circuit Court of Miller County, Ark.)	Yes[96]
Nicholas v. American Modern Home Insurance Co., Case No. CV-2011-0270-2 (Circuit Court of Miller County, Ark.)	Yes[97]

* * *

[93] Exhibit 85 hereto.

[94] Exhibit 86 hereto.

[95] Exhibit 87 hereto.

[96] Exhibit 88 hereto.

[97] Exhibit 89 hereto.

APPENDIX 2

Excerpts from Notice of Removal,
***Goodner v. Clayton Homes, Inc.*, No. 12-4001**
(W.D. Ark. Jan. 6, 2012), ECF No. 1 at 17-21.

Case 4:12-cv-04001-SOH Document 1
Filed 01/06/12 Page 1 of 42 PageID#:1

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION**

THOMAS GOODNER, and LINDA GOODNER, individually and On Behalf of a Class of All Other Similarly Situated Individuals; Plaintiffs, v. CLAYTON HOMES, INC., CMH HOMES, INC., and VANDERBILT MORTGAGE & FINANCE, INC.; Defendants.	Case No. 12-4001

NOTICE OF REMOVAL

(Filed Jan. 6, 2012)

* * *

awarded $19.6 million in plaintiffs' attorneys' fees per case. This pattern and practice, as evidenced by the chart below and the referenced attached exhibits, demonstrates Plaintiffs' counsel's practice of evading federal court jurisdiction through creative pleading

only to reach Arkansas state court class action settlements for exorbitant sums.[11]

* * *

[11] Notably, twenty-three (23) of the twenty-four (24) class action settlements listed in this chart were settled in Miller County, which is in the same Judicial circuit as Lafayette County, the county where Plaintiffs filed their Complaint. *See* Ark. Code Ann. § 16-13-3201(b).

NON-EXHAUSTIVE LIST OF ARKANSAS STATE COURT CLASS ACTION SETTLEMENTS IN WHICH *GOODNER* PLAINTIFFS' COUNSEL WERE PLAINTIFFS' CLASS COUNSEL[12]

CASE STYLE	DOES THE COMPLAINT PURPORT TO CAP DAMAGES?	ASSESSMENT BY PLAINTIFFS' COUNSEL OF VALUE OF CLASS ACTION SETTLEMENT	PLAINTIFFS' ATTORNEYS' FEE
Meredith v. Clayton Homes, Inc.; *CMH Homes, Inc.*, Case No. CV-2005-72-2 (Circuit Court of Miller County, Ark.) ("*Meredith*")	Yes[13]	$77.3-$92.4 million[14]	$15,000,000[15]
Beasley v. Prudential General Insurance Co., Case No. CV-2005-58-1 (Circuit Court of Miller County, Ark.) ("*Beasley*") • Hartford Settlement • LM Property & Casualty Settlement	Yes[16]	$88 million[17] $40.7 million[18]	$20,000,000[19] $8,900,000[20]
Lovelis v. TitleFlex Corp., Case No. CIV-2004-211 (Circuit Court of Clark County, Ark.) ("*TitleFlex*")	Yes[21]		$29,200,000[22]
Johnson v. State Auto Mutual Insurance, et al. Case No. CV-2010-114-3 Circuit Court of Miller County, Ark.) ("*Johnson*")	Yes[23]		$9,500,000[24]

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[12] This non-exhaustive list is based on a review of court filings in certain Arkansas counties conducted during the short time period after service of the Complaint in this civil action and before removal. The list is non-exhaustive because many Arkansas counties, such as Miller County, do not have an on-line database of their cases so there is not a practicable way to search for all cases in which the *Goodner* plaintiffs' counsel were plaintiffs' class counsel in class action settlements.

[13] *Meredith* Plaintiffs' Original Class Complaint, Exhibit 10 hereto; *Meredith* Plaintiffs' First Amended Class Action Complaint, Exhibit 11 hereto.

[14] *Meredith* Plaintiffs' Memorandum of Law in Support of Joint Motion for Final Approval of Class Action Settlement ¶¶ 3, 9 (excerpt attached as Exhibit 7 hereto); *Meredith* Class Counsels' Application for Attorneys' Fees, Costs, etc. ¶¶ 2, 6, 8 (excerpt attached as Exhibit 8 hereto).

[15] *Meredith* Final Order ¶ 8, Exhibit 9 hereto.

[16] *Beasley* Plaintiffs' Original Class Complaint, Exhibit 12 hereto.

[17] *Beasley* Class Counsels' Application for Attorneys' Fees (June 12, 2006), excerpt attached as Exhibit 13 hereto; *Beasley* Plaintiff's Brief in Support of the Joint Motion for Final Approval of the Settlement (June 12, 2006), excerpt attached as Exhibit 14 hereto.

[18] *Beasley* Class Counsels' Application for Attorneys Fees (March 28, 2007), excerpt attached as Exhibit 15 hereto.

[19] *Beasley* Final Order and Judgment (June 13, 2006), Exhibit 16 hereto.

[20] *Beasley* Final Order and Judgment (March 29, 2007), Exhibit 17 hereto.

[21] *TitleFlex* Plaintiffs' Original Class Complaint, 2004 WL 4979307 (Ark. Cir.).

[22] *TitleFlex* Final Order and Judgment, 2007 WL 6509200 (Ark. Cir. Feb. 1, 2007).

[23] *Johnson* Plaintiff's Class Complaint, Exhibit 18 hereto.

[24] *Johnson* Final Order and Judgment (June 28, 2010), Exhibit 19 hereto.

Grammer v. Sunbeam Products, Inc., 2008 WL 2713362, Case No. CV-2004-407-2 (Circuit Court of Miller County, Ark.) ("*Grammer*")	Yes[25]		$7,500,000[26]
Droste v. Farmers Insurance Exchange, Case No. CV-2004-294-3 (Circuit Court of Miller County, Ark.) ("*Droste*")	Yes[27]	$883 million[28]	$37,185,000[29]
Alexander v. Nationwide Mutual Insurance Co. Case No. CV-2009-120-3 (Circuit Court of Miller County, Ark. ("*Alexander*")	Yes[30]		$32,000,000[31]
Chivers v. State Farm & Casualty Co., Case No. CV-2010-251-3 (Circuit Court of Miller County, Ark.) ("*Chivers*")	Yes[32]	$130-189 million[33]	$40,000,000[34]
Feely v. Allstate, Case No. CV-2004-294-3A (Circuit Court of Miller County, Ark.) ("*Feely*")	Yes[35]	$1,405 million[36]	$63,900,000[37]
Atkinson v. General Casualty Co. of Wisconsin, Case No. CV-2007-126-3 (Circuit Court of Miller County, Ark.) ("*Atkinson*")	Yes[38]	$13.9 million[39]	$1,595.000[40]

[25] *Grammer* Plaintiff's Original Class Complaint, Exhibit 20 hereto.

[26] *Grammer* Final Order and Judgment, 2008 WL 2713362 (Ark. Cir. May 15, 2008).

[27] *Droste* Fourth Amended Complaint, Exhibit 21 hereto.

[28] *Droste* Class Counsel's Application for Attorneys' Fees (Jan. 21, 2011), excerpt attached as Exhibit 22 hereto.

[29] *Droste* Final Judgment (Jan. 24, 2011), Exhibit 23 hereto.

[30] *Alexander* Plaintiffs' Class Complaint, Exhibit 24 hereto.

[31] *Alexander* Final Order and Judgment (July 27, 2009), Exhibit 25 hereto.

[32] *Chivers* Plaintiffs' Class Complaint, Exhibit 26 hereto.

[33] *Chivers* Class Counsels' Application for Attorneys' Fees (Oct. 4, 2010), excerpt attached as Exhibit 27 hereto.

[34] *Chivers* Final Order and Judgment (Oct. 5, 2010), Exhibit 28 hereto.

[35] *Feely* Plaintiffs' First Amended Class Complaint, Exhibit 29 hereto.

[36] *Feely* Class Counsel's Application for Attorneys' Fees (May 5, 2011), excerpt attached as Exhibit 30 hereto.

[37] *Feely* Final Order and Judgment (May 6, 2011), Exhibit 31 hereto.

[38] *Atkinson* Plaintiffs' Class Action Complaint, Exhibit 32 hereto.

[39] *Atkinson* Class Counsels' Application for Attorneys' Fees (August 8, 2007), excerpt attached as Exhibit 33 hereto.

[40] *Atkinson* Final Order and Judgment (August 10, 2007), excerpt attached as Exhibit 34 hereto.

Cazares v. Allstate Assurance Co., Case No. CV-2009-72-3 (Circuit Court of Miller County, Ark.) ("*Cazares*")	Yes[41]	$440-$783 million[42]	$36,208,000[43]
Easley v. The Ohio Casualty Insurance Co. Case No. CV-2007-139-3 (Circuit Court of Miller County, Ark.) ("*Easley*")	Yes[44]	$15.2 million[45]	$3,995.000[46]
Gooding v. Grange Indemnity Insurance Co. Case No. CV-2007-456-3 (Circuit Court of Miller County, Ark.) ("*Gooding*")	Yes[47]	$12.7 million[48]	$3,160,801[49]
Hunsucker v. American Standard Insurance Company of Wisconsin, Case No. CV-2007-155-3 (Circuit Court of Miller County, Ark.) ("*Hunsucker*")	Yes[50]	$184 million[51]	$27,495,000[52]
Soto v. USAA Casualty Insurance Co., Case No. CV-2009-132-2 (Circuit Court of Miller County, Ark.) ("*Soto*")	Yes[53]	$49 – $79.6 million[54]	$8,000,000[55]
Sweeten v. American Empire Insurance Co., Case No. CV-2007-154-3 (Circuit Court of Miller County, Ark.) ("*Sweeten*")	Yes[56]	$10.1 million[57]	$3,000,000[58]

[41] *Cazares* Plaintiffs' Class Action Complaint, Exhibit 35 hereto.

[42] *Cazares* Class Counsel's Application for Attorneys' Fees (June 19, 2009), excerpt attached as Exhibit 36 hereto.

[43] *Cazares* Final Order and Judgment (June 19, 2009), excerpt attached at Exhibit 37 hereto.

[44] *Easley* Plaintiff's Class Action Complaint, Exhibit 38 hereto.

[45] *Easley* Class Counsels' Application for Attorneys' Fees (August 2, 2007), excerpt attached as Exhibit 39 hereto.

[46] *Easley* Final Order and Judgment (August 6, 2007), excerpt attached as Exhibit 40 hereto.

[47] *Gooding* Plaintiff's Class Action Complaint, Exhibit 41 hereto.

[48] *Gooding* Class Counsel's Application for Attorneys' Fees (Feb. 29, 2008), excerpt attached as Exhibit 42 hereto.

[49] *Gooding* Final Order and Judgment (March 4, 2008), excerpt attached at Exhibit 43 hereto.

[50] *Hunsucker* Plaintiff's Class Action Complaint, Exhibit 44 hereto.

[51] *Hunsucker* Class Counsels' Application for Attorneys' Fees (August, 2007), excerpt attached as Exhibit 45 hereto.

[52] *Hunsucker* Final Order and Judgment (August 10, 2007), excerpt attached as Exhibit 46 hereto.

[53] *Soto* Plaintiffs' Class Action Complaint, Exhibit 47 hereto.

[54] *Soto* Class Counsel's Application for Attorneys' Fees (July 1, 2009), excerpt attached as Exhibit 48 hereto.

[55] *Soto* Final Order and Judgment (August 3, 2009), excerpt attached as Exhibit 49 hereto.

[56] *Sweeten* Plaintiffs' Class Action Complaint, Exhibit 50 hereto.

[57] *Sweeten* Class Counsels' Application for Attorneys' Fees (August 17, 2007), excerpt attached as Exhibit 51 hereto.

[58] *Sweeten* Final Order and Judgment (August 20, 2007), excerpt attached as Exhibit 52 hereto.

Webb v. The First Liberty Insurance Corp., Case No. CV-2007-418-3 (Circuit Court of Miller County, Ark.) ("*Webb*")	Yes[59]	$38 million[60]	$7,500,000[61]
Warmack-Muskogee Limited Partnership v. PriceWaterHouseCoopers LLP; KPMG LLP; Bearingpoint, Inc.; Ernst & Young; CAP Gemini, Case No. E2001-504-3 (Circuit Court of Miller County, Ark.) ("*Warmack-Muskogee*") • PriceWaterhouseCoopers Settlement • KPMG Settlement • Ernst & Young Settlement • Bearing Point Settlement			 $18,157,000[62] $5,666,667[63] $6,000,000[64] $5,666,667[65]
Lane's Gifts and Collectibles v. Yahoo, Inc., et al. Case No. CV-2005-52-1 (Circuit Court of Miller County, Ark.) ("*Lane's Gift*") • Google Settlement • MIVA, Inc. Settlement		 $3.9 million[66]	 $30,000,000[67] $1,287,200[68]
TOTALS		$3.39 billion to $3.83 billion	$420,916,335

* * *

[59] *Webb* Plaintiff's Class Action Complaint, Exhibit 53 hereto.

[60] *Webb* Class Counsel's Application for Attorneys' Fees (Feb. 28, 2008), excerpt attached as Exhibit 54 hereto.

[61] *Webb* Final Order and Judgment (March 3, 2008), excerpt attached as Exhibit 55 hereto.

[62] *Warmack-Muskogee* Final Order and Judgment (March 5, 2004), Exhibit 56 hereto.

[63] *Warmack-Muskogee* Final Order and Judgment (June 24, 2004), Exhibit 57 hereto.

[64] *Warmack-Muskogee* Final Order and Judgment (November 12, 2004), Exhibit 58 hereto.

[65] *Warmack-Muskogee* Final Order and Judgment (June 24, 2004), Exhibit 59 hereto.

[66] *Lane's Gift* Class Counsel's Application for Attorneys' Fees (April 29, 2008), excerpt attached as Exhibit 60 hereto.

[67] *Lane's Gift* Final Order and Judgment (July 26, 2006), Exhibit 61 hereto.

[68] *Lane's Gift* Final Order and Judgment, 2008 WL 2713363 (Ark. Cir. April 30, 2008).

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

SUPREME COURT, U.S.
FILED
OCT 29 2012
OFFICE OF THE
SUPREME COURT

No. 11-1450

IN THE

Supreme Court of the United States

THE STANDARD FIRE INSURANCE COMPANY,

Petitioner,

v.

GREG KNOWLES, individually and as class representative on behalf of all similarly situated persons within the State of Arkansas,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICUS CURIAE* SUGGESTING REVERSAL

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICUS CURIAE* SUGGESTING REVERSAL

INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Manufacturers (the "NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

The NAM frequently participates as *amicus curiae* in cases involving significant questions related to class actions, which are of substantial concern to the NAM's members. In the past decade, those cases have included the following before this Court: *Whirlpool Corp. v. Glazer*, No. 12-322 (amicus brief in support of petition for writ of certiorari); *Pella Corp. v. Saltzman*, No. 10-355 (amicus brief in support of petition for certiorari); *Dow Chemical Co. v. Tanoh*, No. 08-1589 (amicus brief in support of petition for certio-

---

[1] No counsel for any party has authored this brief in whole or in part, and no person or entity other than the NAM or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

rari); *Hopeman Bros., Inc. v. Acker*, No. 02-520 (amicus brief in support of petition for certiorari); *Dow Chemical Co. v. Stephenson*, No. 02-271 (amicus brief in support of petitioners); *Ford Motor Co. v. McCauley*, No. 01-896 (amicus brief in support of petitioners); *General Electric Capital Corp. v. Thiessen*, No. 01-881 (amicus brief in support of petition for certiorari).

Cases in state courts during the same period have included the following: *Weinstat v. Dentsply International, Inc.* (amicus letter to California Supreme Court encouraging it to grant review); *Henry v. Dow Chemical Co.* (amicus briefs encouraging Michigan Supreme Court to grant review and supporting defendant-appellant); *Safale v. Jacuzzi Whirlpool Bath, Inc.* (amicus letter encouraging California Court of Appeals to publish its opinion); *Engle v. Liggett Group, Inc.* (amicus briefs urging Florida Supreme Court to reverse class certification and, when it did not do so, in support of petition for rehearing); *Coker v. DaimlerChrysler Corp.* (amicus brief urging North Carolina Supreme Court to affirm order dismissing amended class action complaint); *Aspinall v. Philip Morris Cos., Inc.* (amicus brief urging Massachusetts Supreme Judicial Court to affirm order decertifying class); *Pitts v. American Security Insurance Co.* (amicus brief urging North Carolina Supreme Court to reverse order certifying class).

STATEMENT

1. The parties dispute whether this lawsuit should proceed in state or federal court. Respondent filed a breach-of-contract suit against Petitioner on behalf of himself and a class of unnamed, similarly situated Arkansans. *See* Pet. App. 56, 71–73. Petitioner removed that suit from the Circuit Court of Miller County, Arkansas, to the United States District Court for the Western District of Arkansas. *See id.* at 36. The district court remanded the case to state court on Respondent's motion, and the Eighth Circuit declined to provide interlocutory review. *Knowles v. Standard Fire Ins. Co.*, No. 4:11-cv-04044, 2011 WL 6013024, at *1, *6 (W.D. Ark. Dec. 2, 2011) (Pet. App. 2, 15), *pet. for interlocutory appeal denied*, No. 11-8030, 2012 WL 3828891, at *1 (8th Cir. Jan. 4, 2012) (Pet. App. 1), *reh'g denied*, 2012 WL 3828845, at *1 (8th Cir. Mar. 1, 2012) (Pet. App. 16). The district court reasoned that Respondent, by stipulating that he, as putative class representative, would not "seek damages for the class ... in excess of $5,000,000 in the aggregate (inclusive of costs and attorneys' fees)," Pet. App. 75, had "shown to a legal certainty that the aggregate damages claimed on behalf of the putative class shall in good faith not exceed the state [*sic*] court's jurisdictional limitation of $5,000,000." *Knowles*, 2011 WL 6013024, at *6 (Pet. App. 15).

The parties, like the district court, assume that the scope of a federal court's removal jurisdiction over a class-action suit is no broader than its original jurisdiction over similar suits. *See, e.g.*, Pet. for a Writ of Cert. at 3; Resp. Br. in Opp'n at 3; Br. for Pet'r at 19–20. That assumption is erroneous and conflicts with the plain text of the governing statute, the Class

Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.), which expressly allows class-action defendants to remove various suits to federal court even if the plaintiffs could not have filed those same suits in federal court initially.

2. In adopting CAFA, Congress found that "[o]ver the past decade, there have been abuses of the class action device" including instances of "State and local courts" "keeping cases of national importance out of Federal court" and "making judgments that impose their view of the law on other States and bind the rights of the residents of those States." Pub. L. No. 109-2, § 2(a)(2), (a)(4), 119 Stat. 4, 4–5 (codified at 28 U.S.C. § 1711 note). CAFA addresses these abuses by loosening the requirements for federal courts to exercise jurisdiction over class actions. An overview of the statutory architecture shows how CAFA expands federal jurisdiction over class actions.

a. Section 4 of CAFA, codified at 28 U.S.C. § 1332(d), amends the diversity jurisdiction statute to expand the original jurisdiction of federal courts over class-action suits.

(i). A "class action," for CAFA purposes, is "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C. § 1332(d)(1)(B). This broad definition includes essentially any civil action filed by an individual plaintiff or a small group of plaintiffs in a representative capacity on behalf of a larger group of plaintiff class members.

(ii). The operative provision of Section 4 authorizes federal courts to exercise "original jurisdiction" over "any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which" the parties are minimally diverse. *Id.* § 1332(d)(2). The parties regard this provision of CAFA as the one controlling this case.

(iii). Section 4 also contains several reticulated exceptions to CAFA's expansion of original jurisdiction. Some of these exceptions limit original jurisdiction over class actions involving certain subject matter; others limit original jurisdiction based on the characteristics of the parties; and still others grant the district court discretion to decline to exercise original jurisdiction under CAFA based on the characteristics of the parties and the court's consideration of the subject matter and other factors. Under these exceptions:

- "[a] district court shall decline to exercise [original] jurisdiction [] over" some class actions in which a super-majority of the class members and at least one defendant are citizens of the state in which the action was filed, *id.* § 1332(d)(4);
- the federal courts' original jurisdiction does not apply to "any class action in which [] the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief," *id.* § 1332(d)(5)(A);
- the federal courts' original jurisdiction does not apply to "any class action in which [] the

number of members of all proposed plaintiff classes in the aggregate is less than 100," *id.* § 1332(d)(5)(B); and

- the federal courts "shall not" exercise original jurisdiction over some class actions "solely involv[ing]" securities or corporate governance issues, *id.* § 1332(d)(9).

Additionally, Section 4 of CAFA provides that a federal district court "may, in the interests of justice and looking at the totality of the circumstances, decline to exercise" original jurisdiction "over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of" several enumerated factors. *Id.* § 1332(d)(3).

Neither party asserts that any of § 1332(d)'s exceptions applies to this case.

(iv). The remaining provisions of Section 4:

- require that "the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs," *id.* § 1332(d)(6);
- fix the point in time at which the "[c]itizenship of the members of the proposed plaintiff classes shall be determined," *id.* § 1332(d)(7);
- establish that CAFA "appl[ies] to any class action before or after the entry of a class certification order," *id.* § 1332(d)(8);

- mandate that "an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized," *id.* § 1332(d)(10); and
- address federal jurisdiction over "mass action[s]," *id.* § 1332(d)(11).

(v). The parties here dispute Respondent's use of a stipulation as a prophylactic effort to ensure that § 1332(d)(2)'s amount-in-controversy threshold for original jurisdiction cannot be deemed satisfied.

b. Section 5 of CAFA, codified at 28 U.S.C. § 1453, creates a stand-alone removal provision for class actions.[2]

(i). That provision applies to any class action within "the meaning[] given such term[] under section 1332(d)(1)." *Id.* § 1453(a). It authorizes that such class actions

> may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(c)(1) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

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[2] The general federal removal statute expressly contemplates the availability of removal jurisdiction under other, more specific provisions. *See* 28 U.S.C. § 1441(a) (governing removal jurisdiction "[e]xcept as otherwise expressly provided by Act of Congress").

Id. § 1453(b). Section 1446 delineates the procedures a defendant must follow to accomplish removal; it does not limit the types of cases subject to removal jurisdiction.

(ii). Section 5 of CAFA also authorizes and provides a procedure for discretionary interlocutory appeal of a district court's order remanding a class action removed to state court. *See id.* § 1453(c).

(iii). Finally, Section 5 excepts from removal jurisdiction under CAFA some class actions "solely involv[ing]" securities or corporate governance issues. *Id.* § 1453(d). The exceptions listed in § 1453(d) are identical to those set forth in § 1332(d)(9). None of the other reticulated exceptions of § 1332(d) appears in or is referenced by § 1453.

(iv). Taken as a whole, § 1453 authorizes broad removal of class actions to federal court.

SUMMARY OF ARGUMENT

CAFA's plain text establishes that Petitioner was entitled to remove this lawsuit to federal court and that the district court erred in ordering remand.

CAFA codifies two distinct expansions of federal jurisdiction over class actions. Section 4 enlarges the federal judiciary's original jurisdiction to include most class-action suits where the putative class includes at least 100 claimants and the aggregate amount in controversy exceeds $5,000,000, as long as the parties are minimally diverse. *See* 28 U.S.C. § 1332(d). Section 5 creates an independent basis of removal for most class-action suits filed in state courts. *See id.* § 1453. These provisions work in parallel, but they are not identical in scope. The difference between them controls this case.

CAFA's provision authorizing removal jurisdiction (Section 5) has a broader scope than its provision enlarging original jurisdiction (Section 4). Congress created this asymmetry by establishing prerequisites to a federal court's exercise of original jurisdiction—including the requirements that a class action must involve an aggregate of 100 claimants and more than $5,000,000—but omitting those requirements from the removal provision. *See id.* § 1332(d)(2), (d)(5)(B); *id.* § 1453(a)–(b). It follows that a class action need not have an aggregate of 100 claimants or $5,000,000 in controversy for a federal court to exercise removal jurisdiction over that suit. As long as a class action satisfies the bedrock constitutional requirements for federal jurisdiction, *see* U.S. CONST., art. III, § 2, cl. 1, and does not fall within any enumerated exception to CAFA's removal provision, *see* 28 U.S.C. § 1453(d), a federal court has subject-matter jurisdiction over the

case if it is removed in accordance with the congressionally prescribed procedures.

Nonetheless, as occurred in this case, *see Knowles*, 2011 WL 6013024, at *2 (Pet. App. 5), lower courts have consistently *assumed* that the criteria for original jurisdiction under § 1332(d) should be transposed onto discussions of removal jurisdiction under § 1453. They have done so without explaining the basis for that transposition or acknowledging that their actions are contrary to CAFA's text. The National Association of Manufacturers has not been able to locate even one instance in which a federal appellate court has offered a reasoned explanation for abandoning the statutory text to read § 1332(d)'s amount-in-controversy or numerosity requirements into § 1453. As suggested by the courts' apparent silence, there is no basis for transposing the requirements set out in § 1332(d)(2) and (d)(5) onto § 1453.

The best reading of § 1453 is as a broad authorization of federal removal jurisdiction over class-action suits in which the parties are minimally diverse. This is such a suit. It follows that removal was proper and the district court erred in ordering remand.

ARGUMENT

CONGRESS AUTHORIZED DEFENDANTS TO REMOVE CLASS-ACTION SUITS TO FEDERAL COURT WITHOUT REGARD TO THE AMOUNT IN CONTROVERSY.

A. There Is No Textual Basis for Reading CAFA To Limit Removal Jurisdiction in the Same Ways that It Limits Original Jurisdiction.

The court below, like most other federal courts considering a motion to remand a class action removed under CAFA, assumed that the prerequisites CAFA sets out for original jurisdiction apply with equal force to removal jurisdiction. *See Knowles*, 2011 WL 6013024, at *2 (Pet. App. 5).[3] There is no basis for that assumption, as prominent commentators have noted.[4]

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[3] *See also, e.g., Frederick v. Hartford Underwriters Ins. Co.*, 683 F.3d 1242, 1245 (10th Cir. 2012); *Hargis v. Access Capital Funding, LLC*, 674 F.3d 783, 789 (8th Cir. 2012); *Keeling v. Esurance Ins. Co.*, 660 F.3d 273, 274 (7th Cir. 2011); *Lewis v. Verizon Commc'ns, Inc.*, 627 F.3d 395, 396 (9th Cir. 2010); *Coll. of Dental Surgeons of P.R. v. Conn. Gen. Life Ins. Co.*, 585 F.3d 33, 39 (1st Cir. 2009); *Strawn v. AT&T Mobility LLC*, 530 F.3d 293, 296–97 (4th Cir. 2008); *Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 401, 404 (6th Cir. 2007); *Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc.*, 485 F.3d 804, 810 (5th Cir. 2007); *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 56–57 (2d Cir. 2006); *Morgan v. Gay*, 471 F.3d 469, 473 (3d Cir. 2006); *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1327 (11th Cir. 2006).

[4] *See* 14B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3724 (4th ed. 2009) ("Section 1453 does not by its terms limit the class actions that benefit from [liberalized removal requirements] to the kinds of class actions as to which CAFA authorized [original] federal jurisdiction."); Adam N. Steinman, *Sausage-Making, Pigs' Ears, and Congressional*

1. As enacted by Section 5 of CAFA, the operative provision of 28 U.S.C. § 1453 contains four elements:

- first, it authorizes removal of "[a] class action";
- second, it instructs that removal should be accomplished in accord with the procedural requirements of section 1446, except that the case need not be removed within a year of its initial filing;
- third, it states that removal authority under CAFA is available even when a defendant in the suit is a citizen of the state where the case was filed; and
- fourth, it allows that removal under CAFA may be accomplished "by any defendant without the consent of all defendants."

28 U.S.C. § 1453(b). Section 5 of CAFA incorporates by reference the definition of a "class action" in Section 4 of CAFA, *see id.* § 1453(a), but contains no other reference to the extensive CAFA statutory scheme for original jurisdiction created by Section 4 and codified in 28 U.S.C. § 1332(d).

The absence of cross-references to the substantive provisions of § 1332(d) highlights what does not appear in § 1453. Section 1453 contains no mention

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Expansions of Federal Jurisdiction: Exxon Mobil v. Allapattah *and Its Lessons for the Class Action Fairness Act*, 81 WASH. L. REV. 279, 292 (2006) ("[T]he plain language of CAFA's removal provision would create an independent basis for removing any class action to federal court (except for certain securities and corporate governance class actions).").

of the requirements that a case involve an aggregate amount in controversy of more than $5,000,000 (§ 1332(d)(2)) and 100 or more putative class members (§ 1332(d)(5)(B)). Nor does it limit removal to those class actions within the original jurisdiction of the federal courts, which would necessarily invoke the restrictions of § 1332(d)(2)–(10). When Congress wishes to limit removal jurisdiction to cases within original federal jurisdiction, it does so expressly. *See, e.g., id.* § 1441(a) (specifying that removal jurisdiction applies only to a "civil action brought in a State court of which the district courts of the United States have original jurisdiction"). The absence of such an express limitation in § 1453 indicates that Congress did not wish to limit removal under CAFA to those cases within the federal courts' original jurisdiction.

2. The text of § 1453's other provisions similarly illustrates that Congress did not envision importing the substantive requirements of § 1332(d) into the removal provision. While § 1453(a) incorporates the definition of "class action" from § 1332(d)(1), there is no reference in § 1453 to any substantive provision of § 1332(d). Section 1453(d), which excepts certain disputes from removal, does not reference any of the reticulated exceptions from § 1332(d), but instead lists the *identical* categories of cases that § 1332(d)(9) excludes from original jurisdiction under CAFA. *Compare id.* § 1332(d)(9)(A)–(C) *with* § 1453(d)(1)–(3).

The absence from § 1453 of any reference to the substantive provisions of § 1332(d) informs interpretation of the removal provision, because "'the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Roberts v. Sea-Land Servs., Inc.*, 132 S. Ct. 1350,

1357 (2012) (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)). This Court has been "reluctant to tamper" with complex statutory schemes and instead has counseled that the detailed nature of such statutes "provides strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (emphasis in original; internal quotation marks omitted). Here, Congress's repetition in § 1453(d) of the exceptions contained in § 1332(d)(9)—contrasted to its omission of any repetition of or reference to the other substantive provisions of § 1332(d)—constitutes "strong evidence that Congress did *not* intend" to impose upon the exercise of CAFA's removal jurisdiction additional requirements "that it simply forgot to incorporate expressly." *Knudson*, 534 U.S. at 209.

Taking the opposite approach and importing wholesale the substantive requirements of § 1332(d) into § 1453—as many federal courts appear to have done *sub silentio*—would render § 1453(d) a pointless redundancy. Implicitly incorporating the full text of § 1332(d) into § 1453(b) means that the limited exclusions from removal jurisdiction contained in § 1453(d) would appear in § 1453 twice—once in § 1453(b) as a result of importing § 1332(d)(9) and again, identically, in § 1453(d); the other exceptions to original jurisdiction contained in § 1332(d) would appear only once, because Congress chose not to establish any of those as exceptions to removal jurisdiction under § 1453. Reading § 1453(b) in a way that renders § 1453(d) redundant contravenes "'a cardinal

principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). *See also, e.g.*, *United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'").

3. While this Court has not previously had occasion to construe § 1453, precedent counsels that CAFA be read in accordance with its plain language. Less than two weeks after CAFA became law, in *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546 (2005), the Court considered the scope of the federal supplemental jurisdiction statute, 28 U.S.C. § 1367. The Court instructed that federal courts "must not give jurisdictional statutes a more expansive interpretation than their text warrants." *Allapattah*, 545 U.S. at 558. But, at the same time, the Court cautioned, "it is just as important not to adopt an artificial construction that is narrower than what the text provides." *Id.*

Allapattah underscores that jurisdictional statutes get no special treatment under the rules of statutory construction and should be construed in accordance with the Court's consistent guidance that "[t]he plain meaning of legislation should be conclusive, except in the 'rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S.

564, 571 (1982)); *see also, e.g., Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)) ("The first step [in statutory interpretation] 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.' The inquiry ceases 'if the statutory language is unambiguous and the statutory scheme is coherent and consistent.'" (internal quotation marks omitted); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

The text of § 1453 authorizes broad removal jurisdiction, and there is no reason for federal courts "to adopt an artificial construction that is narrower than what the text provides." *Allapattah*, 545 U.S. at 558.

4. In authorizing the removal of cases not subject to the district courts' original jurisdiction, CAFA is consistent with several other federal removal statutes. Though the general removal statute applies only to a "civil action brought in a State court of which the district courts of the United States have original jurisdiction," 28 U.S.C. § 1441(a), several other removal statutes have broader application. Congress has enacted several specific removal provisions to supplement the general removal statute, and a number of them authorize removal to federal court of cases that could not have been filed there in the first instance. Interpreting § 1453 by its plain text is harmonious with these other specific removal provisions.

For example, Congress has provided a broad right of removal in suits against federal officers for actions taken under color of their office. *See id.* § 1442. The right of removal under that provision is "absolute" and may be exercised "regardless of whether the suit could originally have been brought in a federal court." *Willingham v. Morgan*, 395 U.S. 402, 406 (1969); *see also, e.g., Am. Policyholders Ins. Co. v. Nyacol Prods., Inc.*, 989 F.2d 1256, 1259 (1st Cir. 1993) (§ 1442 "is designed to allow federal officers to remove actions to federal court that would otherwise be unremovable"); 14C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3726 (4th ed. 2009) ("[T]he special right of removal conferred on federal officers may be exercised even if the plaintiff could not have brought the action initially in a federal court.").

Similarly, under 28 U.S.C. § 1442a, which provides a parallel right of removal for members of the United States armed forces, "a district court has jurisdiction to hear an action removed ... even if the initial action could not have been commenced by the plaintiff in a federal forum." *Mir v. Fosburg*, 646 F.3d 342, 344 (9th Cir. 1980). Likewise, 28 U.S.C. § 1443 authorizes removal to federal court of state civil or criminal proceedings that would deny the defendant civil rights guaranteed by law. *See, e.g., Georgia v. Rachel*, 384 U.S. 780, 804–05 (1966) (holding that state trespass prosecution arising from activities allegedly protected by Civil Rights Act of 1964 could be removed to federal court under § 1443). So, too, 28 U.S.C. § 1444, allowing the United States to remove quiet title actions, "'confers a substantive right to remove, independent of any other jurisdictional limitations.'" *Hussain v. Boston Old Colony Ins. Co.*, 311

F.3d 623, 629 (5th Cir. 2002) (quoting *City of Miami Bch. v. Smith*, 551 F.2d 1370, 1373–74 n.5 (5th Cir. 1977)); *see also, e.g.*, 14C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3728 (4th ed. 2009) ("Unlike the practice under the general removal statute, removal under Section 1444 does not depend on a showing that the state court action originally could have been brought in a federal court.").

Section 1453's broad authorization of removal, including for class actions that the plaintiffs could not have filed in federal court initially, aligns with other stand-alone removal provisions that authorize removal of cases beyond the reach of the general removal statute and not subject to the district courts' original jurisdiction.

B. Objections to the Plain-Text Reading of CAFA Are Unavailing.

1. References to removal in the substantive provisions of § 1332(d) do not limit § 1453's breadth. While § 1453 contains no reference to the substantive provisions of § 1332(d), two of those provisions do mention removal. Those references, however, do not limit the scope of § 1453.

The first reference appears in § 1332(d)(10), which instructs courts on how to consider the citizenship of unincorporated associations for purposes of original jurisdiction under § 1332(d) and removal jurisdiction under § 1453. *See* 28 U.S.C. § 1332(d)(10) ("For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized."). This provision relates only to ensuring that

minimal diversity is satisfied for the exercise of either original jurisdiction or removal jurisdiction. There is no reason to read this mention of § 1453 in a focused, definitional provision as imposing § 1332(d)'s limits on original jurisdiction wholesale upon § 1453's authorization of removal jurisdiction.

The second reference appears in § 1332(d)(11), which extends federal jurisdiction under CAFA to "mass action[s]." *Id.* § 1332(d)(11)(A). Mass actions are distinct from class actions in that they do not proceed in a representative capacity; instead, they are cases "in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the grounds that the plaintiffs' claims involve common questions of law or fact." *Id.* § 1332(d)(11)(B)(i). Section 1332(d)(11)(A) states that, "[f]or purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs."

Section 1332(d)(11)(A) complements § 1453. It provides that a mass action satisfying the substantive requirements of § 1332(d)(2)–(10) "shall be deemed to be a class action" that is therefore "removable" under § 1453. In the absence of § 1332(d)(11), mass actions would not be removable under CAFA, because § 1453 makes no mention of mass actions. But the fact that Congress decreed that *mass* actions must satisfy § 1332(d)(2)–(10), as well as the requirements of § 1332(d)(11), to be eligible for removal under § 1453 in no way implies that *class* actions must do the same. In fact, the express requirement that mass actions meet the strictures of § 1332(d)(2)–(10) highlights the absence

of any parallel provision limiting removal of class actions under § 1453.

2. Constitutional avoidance considerations provide no reason for extending all of the § 1332(d) limits into § 1453. While § 1453 authorizes federal courts to exercise removal jurisdiction over class-action suits beyond the reach of their original jurisdiction, "Congress may not expand the jurisdiction of the federal courts beyond the bounds established by the Constitution," *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 491 (1983). Article III's fundamental limits on federal jurisdiction still apply. *See* U.S. CONST., art. III, § 2, cl. 1.

Under Article III's Diversity Clause, those fundamental limits require only minimal diversity. This Court has long held that the "complete diversity requirement is based on the diversity statute, not Article III of the Constitution," *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 829 n.1 (1989), and that "Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens," *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 531 (1967). Moreover, amount-in-controversy requirements for diversity jurisdiction have no constitutional roots; they are entirely statutory creations. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514–15 (2006) (noting that Congress "has made an amount-in-controversy threshold an ingredient of subject-matter jurisdiction in delineating diversity-of-citizenship jurisdiction"); *Allapattah*, 545 U.S. at 552; *Tashire*, 386 U.S. at 531.

Given these constitutional considerations, a requirement of minimal diversity should arguably be

read into § 1453 under the canon of constitutional avoidance. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 787 (2008) (quoting *INS v. St. Cyr*, 533 U.S. 289, 299–300 (2001)) ("'We are obligated to construe the statute to avoid constitutional problems' if it is 'fairly possible' to do so.").

Avoidance considerations, however, do not provide license to rewrite *other* parts of CAFA where no potential constitutional concern exists. Other than a requirement of minimal diversity, therefore, there is no avoidance-based justification for imposing upon § 1453 the substantive requirements of § 1332(d), including either the amount-in-controversy requirement or the numerosity requirement.[5]

3. Reading CAFA's removal provision according to its terms does not produce absurd results. "It is well established that 'when the statute's language is plain, the sole function of the court—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'" *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*,

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[5] If engrafting even a minimal-diversity requirement onto § 1453 were deemed inappropriate, despite avoidance considerations, that would hardly suggest that numerous additional provisions from § 1332(d) should be engrafted onto § 1453. To the contrary, this conclusion would simply reflect a judgment that § 1453 must be construed *in accordance with* its plain language and that even avoidance considerations would not justify deviating from that plain language. In that case, § 1453 would be unconstitutional as applied to the narrow category of cases where even minimal diversity was lacking, but otherwise enforceable according to its terms.

530 U.S. 1, 6, (2000)); *see also, e.g.*, *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring) ("Where the language of a statute is clear in its application, the normal rule is that we are bound by it. ... Where the plain language of the statute would lead to patently absurd consequences that Congress could not *possibly* have intended, we need not apply the language in such a fashion." (emphasis in original; internal quotation marks and citations omitted).

There is nothing inherently anomalous about CAFA extending removal jurisdiction to cases not subject to original jurisdiction. That merely makes some class actions triable in federal court at the sole option of the defendant. As explained above, several removal provisions reflect a policy of allowing only defendants to choose a federal forum for certain litigation.

Congress had particularly good reasons for making such a choice as to class actions. In crafting CAFA, Congress reacted to "abuses of the class action device," Pub. L. No. 109-2, § 2(a)(2), 119 Stat. 4, 4 (codified at 28 U.S.C. § 1711 note), and "sought to check what it considered to be the overreadiness of some state courts to certify class actions," *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1473 (2010) (Ginsburg, J., dissenting). It is neither surprising nor inexplicable that, in responding to widespread, systemic abuses that distorted the class action device in plaintiffs' favor, Congress chose to give defendants greater recourse than plaintiffs to the neutrality of a federal forum. Congress reasonably addressed complaints that some state courts treat class action defendants unfairly by

authorizing any defendant to remove any class action within the scope of Article III to federal court.

Congress's chosen solution may not be the only conceivable policy solution to this problem, but it is not so unreasonable as to allow the federal courts to override clear statutory text.

C. CAFA Authorizes Removal in this Case, and the District Court Erred by Remanding this Case to State Court.

Because § 1453 authorizes a defendant to remove a class action from state court to federal court without regard to § 1332(d)'s requirements for original jurisdiction, the district court erred in remanding this case to state court. Petitioner was entitled to remove this suit to federal court. Petitioner and Respondent are citizens of different States, thereby satisfying minimal diversity. *See* Pet. App. 58 (Compl. ¶¶ 6–7). Moreover, no amount-in-controversy requirement applies to a case removed under § 1453. Thus, Respondent's stipulation has no role to play in the jurisdictional analysis.

The district court erred by conflating removal jurisdiction under § 1453 with original jurisdiction under §1332(d). In setting forth the requirements for federal jurisdiction, the district court looked to § 1332(d)(2) and (d)(6) without ever recognizing that § 1453 does not incorporate either subsection:

> CAFA operates to grant federal district courts original jurisdiction over class actions where there is diversity of citizenship between the plaintiff and defendant and when "the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs."

> 28 U.S.C. § 1332(d)(2). The claims of the potential class members must be aggregated to determine whether the jurisdictional minimum has been met. 28 U.S.C. § 1332(d)(6). ...
>
> To defeat remand, a defendant has the burden of showing by a preponderance of the evidence that the amount in controversy exceeds the federal court's minimum threshold for jurisdiction, which is $5 million in the aggregate.

Knowles, 2011 WL 6013024, at *2–*3 (Pet. App. 5–6). Indeed, the district court mentioned § 1453 only to explain that CAFA does not require class actions to be removed within a year of being filed. *See id.* at *5 (Pet. App. 13). The Eighth Circuit did not address the requirements of § 1453 because it denied, without explanation, Petitioner's request for leave to appeal the district court's remand order, *see Knowles*, 2012 WL 3828891, at *1 (Pet. App. 1), *reh'g denied*, 2012 WL 3828845, at *1 (Pet. App. 16).

The lower courts' failures to address the removal jurisdiction authorized by § 1453—jurisdiction that expands the reach of the federal judicial power to this case—requires reversal.

CONCLUSION

The Court should hold that 28 U.S.C. § 1453 means what it plainly says and conclude that the district court erred in remanding to state court this suit, which falls within the federal removal jurisdiction authorized by Congress in CAFA.

Respectfully submitted,

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OCTOBER 29, 2012

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
NOV 29 2012
OFFICE OF THE CLERK

No. 11-1450

In The
Supreme Court of the United States

THE STANDARD FIRE INSURANCE COMPANY,

Petitioner,

v.

GREG KNOWLES, Individually and as Class Representative on Behalf of all Similarly Situated Persons Within the State of Arkansas,

Respondent.

On Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

BRIEF OF AMICUS CURIAE PARTNERSHIP FOR AMERICA IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Partnership for America (the "Partnership") is an advocacy organization dedicated to advancing common sense public policies that are rooted in America's traditions of individual freedom and free markets and consistent with the Founding principles of America. http://partnership4america.org. In furtherance of these goals, the Partnership filed an Amicus brief last Term in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), challenging the Constitutionality of the Patient Protection and Affordable Care Act.

The partnership is also committed to common sense legal reform. Several of its officers and members were involved in the coalition that promoted enactment of the Class Action Fairness Act (CAFA), the jurisdictional statute at issue in this case. It is the position of the Partnership that early and erroneous departures from the plain meaning of Article III of the Constitution have fueled the litigation explosion of the last fifty years, contributing to the imposition of billions of dollars of costs on American consumers, the loss of hundreds of thousands of American jobs, reduced foreign investment, increased medical costs, and fewer potentially lifesaving medical products being made available to the public.

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[1] The parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel, make a monetary contribution to the preparation or submission of this brief. *See* SUP. CT. R. 37.6; *id.* R. 37.2(a).

INTRODUCTION AND SUMMARY OF ARGUMENT

Article III was designed to establish a federal judiciary "competent to the determination of matters of national jurisdiction." THE FEDERALIST No. 81, at 485 (Hamilton) (Clinton Rossiter ed., 1961). The Framers were unwilling to rely on the state courts for this purpose, as the Antifederalists preferred, largely because "the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes...." *Id.* at 486. Indeed, the Framers were so apprehensive of actual or perceived state court bias in favor of local interests that they considered a neutral federal tribunal necessary in some cases to the peace and harmony of the union, and they took care to extend federal jurisdiction to "cases in which the state tribunals cannot be supposed to be impartial." THE FEDERALIST No. 80, at 487 (Hamilton). In particular, Article III, Section 2 mandates that "[t]he judicial Power shall extend to," among other things, "Controversies between two or more States;—between a State and Citizens of another State,—*between Citizens of different States*,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. CONST. art. III, § 2.

Thus, although the Framers generally left undisturbed the jurisdiction of state courts over cases arising under state law, they established concurrent jurisdiction in federal courts over cases in which the impartiality of state courts would be most directly, and obviously, tested: those cases in which the interests of the state itself, or its citizens, were

adverse to the interests of other states, foreign countries, or their citizens. Of particular concern to the Framers in establishing federal jurisdiction over disputes "between citizens of different states" was the crippling effect that judicial bias favoring in-state interests, whether real or perceived, would have on interstate commerce. By ensuring that a neutral federal forum was available in such cases, the Framers were thus animated by much the same spirit that resulted in the various substantive constitutional protections against state interference with interstate and foreign commerce. *See* U.S. CONST. art. I, § 8, cl. 3; *id.* § 10; art. IV, § 2, cl. 1; *see generally* THE FEDERALIST No. 80, at 478 (Hamilton).

Despite the clear text of Article III mandating that the judicial power of the United States "shall extend" to controversies "between citizens of different States" and the important role this provision was intended to play in promoting interstate commerce and uniting the several States into a single, unified nation, the federal courts have systematically resisted exercising the diversity jurisdiction. In this case, for example, the district court remanded to the state court a putative class action brought by a local plaintiff against an out-of-state insurance company based on a stipulation that "the Plaintiff and Class ... will seek to recover total aggregate damages of less than five million dollars," Pet. App. 6, the amount-in-controversy required by the Class Action Fairness Act of 2005, *see* 28 U.S.C. § 1332(d)(2). The court held that "[f]ederal courts must strictly construe the federal removal statute and resolve any ambiguities about federal jurisdiction in favor of remand." Pet. App. 4. Remarkably, the Eighth Circuit refused even to hear an appeal from this decision, *see* Pet. App. 1, though

in a subsequent case it issued an opinion affirming remand in virtually identical circumstances, *see Rolwing v. Nestle Holdings, Inc.*, 666 F.3d 1069 (2012).

These rulings are plainly in error. Leaving aside the likely invalidity of respondent's purported attempt to bind absent members of a class that has not yet even been certified, the stipulation on its face does not prevent respondent from receiving (as opposed to "seek[ing]") an award greater than $5 million. More important still, it does not prevent respondent from seeking and receiving a settlement far in excess of $5 million. Indeed it appears that in past cases brought in the same state court by the same counsel, the court has ordered extraordinarily burdensome and expensive discovery and has deferred ruling on motions to dismiss—or even on whether a class could be certified—until after discovery was complete, thus virtually forcing defendants to settle to avoid discovery costs far exceeding any damages likely to be recovered by the plaintiffs. *See* Pet. App. 4-6. Furthermore, it has been reported that in another case brought in the same court by the same counsel subject to an identical stipulation, counsel recently requested a settlement of $21 million from a group of insurers. *See* Allison Frankel, *Are Class Action Lawyers in Arkansas Snubbing SCOTUS (and CAFA)?*, On the Case (Oct. 3, 2012), http://bitly.com/T2Tffh. It thus seems evident that the purpose of the stipulation here was not to limit the putative class's recovery, but rather to trap petitioner in a plaintiff-friendly state court that likely will permit extensive, burdensome discovery and thus facilitate the extortion of a settlement from petitioner far in excess of $5 million.

Although the rulings below constitute a particularly egregious example of the federal judiciary's resistance to exercising the diversity jurisdiction, they are unfortunately part of a larger pattern. Indeed, the federal courts have developed an entire framework of doctrines that seem designed largely and systematically to limit or defeat the text and purposes of Article III. Some prominent examples include the following:

1. Relying on dicta in this Court's decision in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), the lower courts have applied a strong presumption against removal, holding that "all doubts about jurisdiction should be resolved in favor of remand to state court." *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 411 (11th Cir. 1999) (citing *Shamrock Oil*, 313 U.S. at 108-09); *see also Barbour v. Int'l Union*, 640 F.3d 599, 605 (4th Cir. 2011) (citing *Shamrock Oil*, 313 U.S. at 108-09). And they have continued to apply this presumption (including here, *see* Pet. App. 4-5), even though this Court has squarely held that there is "no question that whenever the subject matter of an action qualifies it for removal, the burden is on a plaintiff to find an express exception." *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 698 (2003); *see also id.* ("[W]hatever apparent force [the anti-removal presumption] might have claimed when *Shamrock* was handed down has been qualified by later statutory development."); Scott R. Haiber, *Removing the Bias Against Removal*, 53 CATH. U. L. REV. 609, 630-33 (2004).

2. In addition, although this Court has correctly recognized that the grant of diversity jurisdiction in Article III is satisfied "so long as any

two adverse parties are not co-citizens," *State Farm Fire & Cas. v. Tashire*, 386 U.S. 523, 531 (1967), it nonetheless held in *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806), that the virtually identical language of the diversity statute requires *complete* diversity of citizenship. That reading, moreover, has prevailed ever since—even though Chief Justice Marshall's perfunctory six-sentence opinion for the Court in *Strawbridge* offered no textual analysis or any other reason in support of its conclusion, and even though Chief Justice Marshall reportedly came to regret the decision as wrongly decided. *See Louisville, Cincinnati, & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497, 555-56 (1844); *see also Removal Cases*, 100 U.S. 457, 479-82 (1879) (Bradley, J., concurring) (criticizing complete diversity requirement).

3. Relying on this Court's decision in *Whitcomb v. Smithson*, 175 U.S. 635 (1900), the courts have applied the so-called "voluntary/involuntary rule," whereby an out-of-state defendant is prohibited from removing a case where complete diversity results from the dismissal of nondiverse defendants without the plaintiffs' assent. And this rule is based on the theory that, "in the absence of a fraudulent purpose to defeat removal, the plaintiff may by the allegations of his complaint determine the status with respect to removability of a case," *Great N. Ry. Co. v. Alexander*, 246 U.S. 276, 282 (1918), even though the presumption that a plaintiff is entitled to choose his forum is inconsistent with diversity jurisdiction and the removal statute, and with prior opinions of this Court, *see Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907). As Congress explained in CAFA, "there is no such presumption. In fact, the

whole purpose of diversity jurisdiction is to preclude any such presumption by allowing state-law based claims to be removed from local courts to federal courts, so as to ensure that all parties can litigate on a level playing field." S. Rep. 109-14, at 56-57.

4. The courts have properly recognized the fraudulent joinder doctrine as an exception to the voluntary/involuntary rule. Under this doctrine, a case may be removed if the nondiverse defendant is dismissed because the plaintiff pleaded fraudulent jurisdictional facts or failed to state a case against the nondiverse defendant. But courts have substantially weakened this doctrine by a series of rules designed to keep diversity cases out of federal court:

(a) Courts have held that "the test for improper joinder is whether the defendant has demonstrated that there is *no possibility* of recovery by the plaintiff against an in-state defendant." *In re 1994 Exxon Chem. Fire*, 558 F.3d 378, 385 (5th Cir. 2009) (alteration omitted) (emphasis added). This standard is extremely difficult, and often impossible, to meet.

(b) Courts disregard evidence that the plaintiff's purpose in joining a nondiverse defendant was to thwart federal jurisdiction. *See Triggs v. John Crump Toyota, Inc.*, 154 F.3d 1284, 1290-91 (11th Cir. 1998).

(c) In analyzing fraudulent joinder, courts apply the "pleadings only" rule, under which, "[i]n evaluating the alleged fraud, the district court must focus on the plaintiff's complaint at the time the petition for removal was filed." *Brown v. Jevic*, 575 F.3d 322, 326 (3d Cir. 2009). This rule is often

fatal to removal, because a plaintiff can avoid pleading the jurisdictional prerequisites for removal until the one-year time limit for diversity removal has passed. *See* 28 U.S.C. § 1446(c). In sharp contrast, to defeat jurisdiction in diversity actions filed originally in federal court, courts will "look beyond the pleadings," "realign[]" the parties, focus exclusively on the "principal purpose of the suit," and squint at elements they consider "window-dressing designed to satisfy the requirements of diversity jurisdiction." *City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 69, 72, 75 (1941).

(d) Courts prohibit jurisdictional discovery to support removal or uncover fraudulent joinder. Indeed, they regard any request for post-removal discovery as "tantamount to an admission that the defendants do not have a factual basis for believing that jurisdiction exists." *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1217 (11th Cir. 2007).

5. Courts ignore the juridical status of limited partnerships and LLCs under state law, treating these legal entities instead as collections of individuals, even while acknowledging that this rule "can validly be characterized as technical, precedent-bound, and unresponsive to policy considerations raised by the changing realities of business organization." *Carden v. Arkoma Assocs.*, 494 U.S. 185, 189 (1990). Thus, complete diversity is lacking if any plaintiff is a citizen of the same state as any of the defendant's partners.

6. Courts require *all* co-defendants to agree unanimously to removal in diversity cases even though the diversity removal statutes (unlike the federal-question removal statute) impose no such unanimity requirement. *Compare* 28 U.S.C.

§§ 1441(a) and 1446(a) *with* 28 U.S.C. § 1446(b)(2)(A). "The rule of unanimity gives each defendant an absolute veto over removal." *Garside v. Osco Drug, Inc.*, 702 F. Supp. 19, 21 (D. Mass. 1988). Thus, plaintiffs can defeat removal by joining a friendly defendant who will refuse to sign a removal petition. Indeed, some federal courts will remand to state court even when the only defendants who have failed to consent to removal are anonymous "Doe" defendants. *See* Haiber, *supra*, at 649 (citing *Erie Ins. Exch. v. Sunbeam-Oster, Inc.*, No. 00-3723, slip op. (D. Md. Aug. 21, 2003)).

7. Even though federal court plaintiffs are permitted to include the value of defendants' counterclaims for purposes of satisfying the amount-in-controversy requirement, *see, e.g., Spectacor Mgmt. Group v. Brown*, 131 F.3d 120, 121 (3d Cir. 1997), defendants seeking removal are not permitted to add the value of their counterclaims to plaintiffs' state court claims for this purpose, *see, e.g., FLEXcon Co., Inc. v. Ramirez Commercial Arts, Inc.*, 190 F. Supp. 2d 185, 187 (D. Mass. 2002).

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"It is perhaps inevitable that courts will interpret jurisdictional statutes with attention to their own institutional interests." Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1489 (2008). But the judicial resistance to diversity jurisdiction reflected in the doctrines and presumptions discussed above is at war with a central purpose of the Founders in establishing the federal judiciary, as we demonstrate in detail below. This Court should thus recognize that the facially contrived stipulation at issue in this

case is but a symptom of a larger problem, and should instruct the federal judiciary that it may not treat diversity jurisdiction, which is mandated by Article III, as an inconvenient and unwanted distraction to be evaded at will.

ARGUMENT

I. THIS CASE FALLS SQUARELY WITHIN THE LANGUAGE AND PURPOSES OF ARTICLE III.

Article III provides that the federal "judicial Power shall extend ... to Controversies ... between Citizens of different States." U.S. CONST. art. III, § 2. As demonstrated below, this provision was intended to provide a neutral forum to protect litigants from real or perceived local bias, and thus to promote and protect national harmony and commerce between the States. This putative class action, brought by a local plaintiff against an out-of-state insurance company in a state court that has gained notoriety as a "judicial hellhole" for out-of-state defendants, *see* Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Certiorari at 5-6, falls squarely within the language of Article III and the purposes for which the diversity jurisdiction was adopted.

1. Under the Articles of Confederation, commerce between the states had been shackled by local prejudice and corresponding distrust. *See, e.g., Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992); *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979); THE FEDERALIST No. 7 (Hamilton). The Framers well understood that if the fledging nation was to succeed, it would have to overcome these tendencies. The new national government was thus

given ultimate legislative power over the regulation of interstate commerce, the citizens of each State were guaranteed all of the privileges and immunities of citizens in all of the States, and the States were expressly barred from enacting such then-common discriminatory measures as tender laws and laws impairing the obligation of debts and other contracts. *See* U.S. CONST. art. I, §§ 8, 10, art. IV, § 2. The new federal judiciary was correspondingly designed to provide a neutral tribunal, not beholden to local interests, in which interstate controversies could be adjudicated. By enabling investors and commercial enterprises to cross state lines with confidence that their legal disputes would be fairly adjudicated in new state markets, diversity jurisdiction went hand-in-hand with other constitutional provisions designed to foster development of a truly national economy.

The call for federal diversity jurisdiction first appeared in the Constitutional Convention on May 28, 1787, in the Virginia Plan, designed by James Madison and proposed by Edmund Randolph. *See* Alison L. LaCroix, *The Authority for Federalism: Madison's Negative and the Origins of Federal Ideology*, 28 L. & HIST. REV. 451, 475, 477 (2010). The Virginia Plan's jurisdictional provision bears only a faint resemblance to the corresponding section of the Constitution that was eventually adopted and ratified. It lacked a grant of general subject matter jurisdiction over disputes arising under federal law, favoring instead specific grants of jurisdiction over the collection of national revenue, the impeachment of national officers, certain maritime criminal and property matters, and disputes between parties of diverse citizenship. The Virginia Plan also proposed to vest federal courts with jurisdiction generally over

all "questions which may involve the national peace and harmony." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 22 (M. Farrand ed., 1911) ("FARRAND'S RECORDS").

Randolph later clarified that the "cases in which foreigners or citizens of other States ... may be interested" referenced by the resolution were a species of those "questions which may involve the national peace and harmony." *Id.* at 238. On June 13, 1787, Randolph moved to boil down the resolution to its essence, leaving to a subcommittee "the business of ... detail[ing] it" in specific terms. *Id.* Aside from revenue collection and impeachment, all of the specific jurisdictional grants proposed by the Virginia Plan, Randolph made clear, were embraced in the general "national harmony" provision at its conclusion. Thus, the judiciary's function of protecting "the harmony of states and that of the citizens thereof" would be preserved by granting to federal courts jurisdiction over "questions which involve the national peace or harmony." *Id.*

Not until July 18 did the Convention adopt a proposal extending federal jurisdiction to "cases arising under laws passed by the general Legislature." 2 FARRAND'S RECORDS at 39. This provision, combined with the provision concerning cases "involv[ing] the national Peace and Harmony," was then taken up by the Committee of Detail. *Id.* at 132-33. In keeping with Randolph's expectation, the Committee provided the "detail[s]" of federal jurisdiction, eliminating the general language regarding cases of "national peace and harmony" and replacing it with specific jurisdictional grants over particular types of cases, including "Controversies ... between Citizens of different States." *Id.* at 172-73.

This provision, which ultimately became the diversity clause, was apparently uncontroversial, for it attracted no attention as the Convention debated various amendments to the Committee of Detail's proposed judiciary article.

2. When the Convention adjourned and sent the new Constitution to the States for ratification, the Antifederalists argued that the proposed federal judiciary would, in George Mason's words, "utterly annihilate ... state courts." 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (J. Elliot ed., 1901) ("ELLIOT'S DEBATES"); *see also id.* at 527. For its part, the diversity clause would result, they argued, in ordinary citizens being forced to endure the expense and inconvenience of litigating their disputes in distant federal courts, especially if appeals had to be taken to the faraway Supreme Court. *See, e.g.*, 3 ELLIOT'S DEBATES at 526 (George Mason); 4 ELLIOT'S DEBATES at 138 (Spencer).

The leading advocates of diversity jurisdiction included some of the leading Framers. James Madison defended diversity jurisdiction by succinctly stating its obvious rationale:

> It may happen that a strong prejudice may arise, in some states, against the citizens of others, who may have claims against them. We know what tardy, and even defective, administration of justice has happened in some states. A citizen of another state might not chance to get justice in a state court, and at all events he might think himself injured.

3 ELLIOT'S DEBATES at 533.

John Marshall placed the point in its larger context, echoing Randolph's argument at the Constitutional Convention that a neutral federal forum for resolving interstate disputes was needed to preserve the peace and harmony of the union:

> To preserve the peace of the Union only, its jurisdiction in this case ought to be recurred to. Let us consider that, when citizens of one state carry on trade in another state, much must be due to the one from the other, as is the case between North Carolina and Virginia. Would not the refusal of justice to our citizens, from the Courts of North Carolina, produce disputes between the States?

Id. at 557.

James Wilson likewise defended the Constitution's grant of jurisdiction over interstate and international disputes: "[I]s it not necessary, if we mean to restore either public or private credit," asked Wilson, "that foreigners, as well as ourselves, have a just and impartial tribunal to which they may resort?" 2 ELLIOT'S DEBATES at 491. Wilson saw diversity jurisdiction as necessary to achieve the "important object [of] extend[ing] our manufactures and our commerce[.] This cannot be done, unless a proper security is provided for the regular discharge of contracts. This security cannot be obtained,

unless we give the power of deciding upon those contracts to the general government." *Id.* at 492.[2]

The most influential defense of the new federal judiciary, however, was provided by Alexander Hamilton in his classic series of essays on Article III in The Federalist Papers. In *Federalist No. 80*, Hamilton emphasized the critical importance of a neutral forum for resolving disputes "in which the State tribunals cannot be supposed to be impartial" or "unbiased." THE FEDERALIST No. 80, at 478. As he explained:

> No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias. This principle has no inconsiderable weight in designating the federal courts as the proper tribunals for the determination of controversies between different States and their citizens.

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[2] Less prominent supporters of the Constitution likewise defended the diversity jurisdiction. In the North Carolina convention, for example, William Davie explained that "[t]he security of impartiality is the principle reason for giving up the ultimate decision of controversies between citizens of different states." 4 ELLIOT'S DEBATES at 159. Davie maintained that diversity jurisdiction was "essential to the interest of agriculture and commerce." *Id.* Among other things, he argued that "tedious delays of judicial proceedings, at present, in some states, are ruinous to creditors," and that it was "necessary, therefore, in order to obtain justice, that we recur to the judiciary of the United States, where justice must be equally administered, and where a debt may be recovered from the citizen of one state as soon as from the citizen of another." *Id.*

Id. Accordingly,

> the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens. [Only] that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded.

Id. Like Marshall and Randolph, Hamilton also emphasized that "[t]he power of determining causes between two States, between one State and the citizens of another, and between the citizens of different States, is ... essential to the peace of the Union." *Id.* at 477.

3. The history of the framing and ratification of the diversity clause thus makes clear that it was designed to ensure that a party in a dispute with a citizen of a different state would be entitled to litigate that dispute in a presumably neutral federal court rather than in a possibly biased state court. The Supreme Court, in one of its earliest examinations of diversity jurisdiction, confirmed this understanding:

> However, true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such

> indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.

Bank of U.S. v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809); *see also, e.g.*, *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816) ("The constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might some times obstruct, or control, or be supposed to obstruct or control, the regular administration of justice.").

This history also makes clear that by ensuring that a neutral federal forum, composed of nonelected judges whose independence from "local attachments" was fortified by life tenure and salary protection, was available for adjudicating disputes between parties from different States, those who framed and ratified Article III sought to preserve national harmony and promote interstate commerce. As Justice Joseph Story explained in his classic *Commentaries on the Constitution*, "Nothing can conduce more to general harmony and confidence among all the states, than a consciousness, that controversies are not exclusively to be decided by the state tribunals; but may, at the election of the party, be brought before the national tribunals." 3 Joseph Story, COMMENTARIES ON THE CONSTITUTION § 1685 (1833). Justice Story also noted "the tendency of such a power to increase the confidence and credit between the commercial and agricultural states." *Id.* As he explained, "[n]o man can be insensible to the value, in promoting credit, of the belief of there being a prompt, efficient, and

impartial administration of justice in enforcing contracts." *Id.*

5. According to some astute observers, diversity jurisdiction has served these vital national interests exceedingly well. Again, Justice Story: "Probably no part of the judicial power of the Union has been of more practical benefit, or has given more lasting satisfaction to the people." *Id.* § 1686. A century later, Judge John J. Parker was equally effusive:

> No power exercised under the Constitution ... had greater influence in welding these United States into a single nation [than diversity jurisdiction]; nothing has done more to foster interstate commerce and communication and the uninterrupted flow of capital for investment into various parts of the Union, and nothing has been so potent in sustaining the public credit and the sanctity of private contracts.

John J. Parker, *The Federal Constitution and Recent Attacks Upon It*, 18 A.B.A. J. 433, 437 (1932); *see also* Chief Justice William H. Taft, *Possible & Needed Reforms in the Administration of Justice in the Federal Courts*, 8 A.B.A.J. 601, 604 (1922) ("No single element ... in our governmental system has done so much to secure capital for the legitimate development of enterprises throughout the west and south as the existence of federal courts there, with a jurisdiction to hear diverse citizenship cases.").

The various means that the federal courts have devised for limiting and avoiding diversity

jurisdiction—represented, in stark relief, by the lower court rulings in this case—are in direct conflict with these salutary purposes reflected in the text and history of Article III.

II. THE DECISIONS BELOW ARE CONTRARY TO THE MANDATORY LANGUAGE OF ARTICLE III.

Given that this lawsuit falls squarely within the scope of the diversity jurisdiction as intended by those who framed and ratified Article III, the rulings below denying a federal forum to petitioners are contrary to the mandatory language of that provision.

1. Article III requires that "[t]he judicial Power of the United States shall be vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. Article III likewise directs that "[t]he judicial Power shall extend" to various enumerated categories of cases and controversies, including "Controversies ... between Citizens of different States." *Id.* art. III, § 2. As Justice Story explained in his landmark opinion in *Martin v. Hunter's Lessee*, "[t]he language of [Article III] throughout is manifestly designed to be mandatory upon the legislature. Its obligatory force is so imperative, that congress could not, without a violation of its duty, have refused to carry it into operation." 14 U.S. (1 Wheat.) at 328; *see also* 1 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 612-14 (1953).

Just as section 1 provides that the federal judicial power "*shall be vested* (not may be vested)" in a supreme court and congressionally established

inferior courts, Justice Story noted, it also provides that "[t]he judges, both of the supreme and inferior courts, *shall hold* their offices during good behaviour, and *shall*, at stated times, receive, for their services, a compensation which shall not be diminished during their continuance in office." *Martin*, 14 U.S. (1 Wheat.) at 328 (emphasis in *Martin*). As Justice Story explained, "[t]he language, if imperative as to one part, is imperative as to all." *Id.* at 330. Congress thus may no more refuse to vest the judicial power than it may "create or limit any other tenure of the judicial office" (besides tenure "during good behaviour") or "refuse to pay, at stated times, the stipulated salary, or diminish it during the continuance in office." *Id.* at 328-29.

Justice Story also noted that the language of Article III vesting the judicial power mirrors that of Articles I and II:

> The first article declares that 'all legislative powers herein granted *shall be vested* in a congress of the United States.' Will it be contended that the legislative power is not absolutely vested? that the words merely refer to some future act, and mean only that the legislative power may hereafter be vested? The second article declares that 'the executive power *shall be vested* in a president of the United States of America.' Could congress vest it in any other person; or, is it to await their good pleasure, whether it is to vest at all? It is apparent that such a construction, in either case, would be utterly inadmissible. Why, then, is it entitled

> to a better support in reference to the judicial department?

Id. at 329-30 (emphasis in *Martin*); *see also* Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 842 (1984).

Justice Story then turned to the language of Section 2 providing that "the judicial power *shall extend*" to the enumerated cases and controversies. *Martin*, 14 U.S. (1 Wheat.) at 331 (emphasis in *Martin*). These words too, said Justice Story, are "used in an imperative sense," and "import an absolute grant of judicial power." *Id.* Thus, the "duty of congress to vest the judicial power of the United States" must be understood as "a duty to vest the *whole judicial power*," else "congress might successively refuse to vest the jurisdiction in any one class of cases enumerated in the constitution, and thereby defeat the jurisdiction as to all." *Id.* at 330 (emphasis in original).

In short, the plain language of Article III makes clear that the federal "judicial power shall extend to all the cases enumerated in the constitution." *Id.* at 333; *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173 (1803) ("The constitution vests the *whole* judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish." (emphasis added)). As demonstrated more fully below, Justice Story's conclusion—that Article III mandates jurisdiction in federal courts in all enumerated cases or controversies—has substantial support in the text of the Constitution and in the historical evidence from

the Constitutional Convention and the ratification debates, and it has never been satisfactorily answered.

2. First, amicus respectfully submits that Justice Story's mandatory view of federal jurisdiction reflects the most natural (and best) reading of Article III. To be sure, after identifying the classes of cases and controversies to which the judicial power shall extend and prescribing the Supreme Court's original jurisdiction, Article III, section 2 provides that "[i]n all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make*" (emphasis added). Given that Article III on its face appears to commit the creation of inferior federal courts to Congress's discretion, the Exceptions Clause of section 2 could be understood to permit Congress to avoid vesting some of the judicial power simply by excepting certain cases or controversies from the Supreme Court's appellate jurisdiction and then declining to create inferior courts with jurisdiction over those matters. Taken to its logical end point, this reading would permit Congress to avoid vesting any of the judicial power apart from the narrow category of cases over which original jurisdiction is assigned to the Supreme Court by Article III.

Whatever force this reading might have if the Exceptions Clause is viewed only in conjunction with Congress's apparent discretion regarding the creation of inferior federal courts, it is plainly at odds with Article III's dual commands that the judicial power "shall be vested" in the Supreme Court and congressionally created inferior courts, and that this power "shall extend" to the cases and controversies

identified in section 2. Any reading of some provisions of Article III that would render other provisions of that Article meaningless should of course be avoided if at all possible. Rather, Article III should be read as a whole in a manner that gives effect to all of its provisions.

Such a reading is clearly possible: although the mandatory provisions of Article III vesting and extending the federal judicial power require that the *entire* judicial power be vested *somewhere* in the federal judiciary, Congress's authority over the inferior Courts and its ability to make exceptions to the Supreme Court's appellate jurisdiction give Congress substantial discretion over where in the federal judiciary that power is vested. Thus, Congress may choose not to grant inferior federal courts jurisdiction over certain cases or controversies enumerated in Article III (or may even choose not to create inferior federal courts at all), so long as the Supreme Court retains appellate jurisdiction over any cases or controversies not cognizable in the inferior federal courts. Alternatively, Congress may except certain enumerated cases or controversies from the Supreme Court's appellate jurisdiction, so long as it creates inferior federal courts with jurisdiction over those matters. Congress may not, however, remove any of the enumerated cases or controversies from the federal judiciary entirely, *both* by excepting it from the Supreme Court's appellate jurisdiction *and* by declining to create an inferior federal court with jurisdiction to consider it. As summarized by Alexander Hamilton in *Federalist No. 82*, "[t]he evident aim of the plan of the convention is that *all* the causes of the specified classes shall, for weighty public reasons, receive their *original or final* determination in the courts of

the union." THE FEDERALIST No. 82, at 494 (Hamilton) (emphasis added); *see also, e.g.*, *Martin*, 14 U.S. (1 Wheat.) at 333 ("The judicial power shall extend to all the cases enumerated in the constitution. As the mode is not limited, it may extend to all such cases, in any form, in which judicial power may be exercised. It may, therefore, extend to them in the shape of original or appellate jurisdiction, or both; for there is nothing in the nature of the cases which binds to the exercise of the one in preference to the other.").

Not only does this reading of Article III respect its mandatory language vesting and extending the federal judicial power, it still accords Congress substantial control over the *allocation* of federal judicial power, consistent with Congress's evident control over the existence of inferior federal tribunals and with the express terms of the Exceptions Clause. Further, this reading is completely consistent with the justification for the constitutional provisions regarding inferior federal courts advanced by leading Framers of the Constitution. *See, e.g.*, THE FEDERALIST No. 81, at 485 (Hamilton) ("The power of constituting inferior courts is evidently calculated to obviate the necessity of having recourse to the Supreme Court in every case of federal cognizance."); 1 FARRAND'S RECORDS at 124 (Madison) ("[U]nless inferior tribunals were dispersed throughout the Republic with *final* jurisdiction in *many* cases, appeals would be multiplied to a most oppressive degree.") And it is demonstrably truer to the plain language of the Exceptions Clause—which by its terms grants Congress power to make exceptions only to the "*supreme Court['s] appellate Jurisdiction*," not to "[*t*]*he judicial Power of the United States*"—than is

the alternative reading, which would allow Congress to use this clause to remove broad classes of cases and controversies (potentially including all but those assigned to the Supreme Court's original jurisdiction) from the federal judicial power entirely. *See, e.g.*, CROSSKEY, *supra*, at 616.[3]

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[3] Some have argued that Article III establishes mandatory federal jurisdiction over some of the classes of cases and controversies it identifies (such as cases arising under the Constitution, laws, and treaties of the United States), but not over others (such as controversies between citizens of different States). Indeed, Justice Story suggested such a distinction in *Martin* itself, albeit in dicta upon which he did not "place any implicit reliance." 14 U.S. (1 Wheat.) at 336. As Justice Story noted, by its terms section 2 extends some heads of federal judicial power to "all cases," but extends others only to "controversies," not "*all* controversies." *Id.* at 334. "From this difference of phraseology," he surmised, "perhaps, a difference of constitutional intention may, with propriety, be inferred." *Id.* "In respect to the first class," Justice Story suggested, "it may well have been the intention of the framers of the constitution imperatively to extend the judicial power either in an original or appellate form to *all cases*: and in the latter class to leave it to congress to qualify the jurisdiction, original or appellate, in such manner as public policy might dictate." *Id.* Justice Johnson, in a separate opinion, answered this argument:

> 'Shall extend to controversies,' appears to me as comprehensive in effect, as 'shall extend to all cases.' For, if the judicial power extend 'to controversies between citizen and alien,' &c., to what controversies of that description does it not extend? If no case can be pointed out which is excepted, it then extends to *all controversies*.

Id. at 375.

Furthermore, it appears that at the time the Constitution was drafted and ratified, the term "cases" was understood to include both criminal and civil cases, while the

3. This textual analysis of Article III is supported by its drafting history and the debates during the Constitutional Convention. As discussed above, *see supra* at 12, much of the specific language of Article III was developed by the Committee of Detail. Accordingly, it bears emphasis that this committee specifically considered and rejected a

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term "controversies" was understood to denote civil cases only. *See, e.g., Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 431-32 (1793) (Iredell, J.); 1 BLACKSTONE COMMENTARIES App. 420 (St. George Tucker ed., 1803). Accordingly, it seems likely that Article III uses the term "cases" to refer to both civil and criminal judicial proceedings, but uses the term "controversies" to refer more narrowly only to civil proceedings. Thus, as Professor Crosskey explained,

> in section 2 of the Judiciary Article, the omission of 'all' from the categories in which the word 'Controversies' was used, arose from the contrast, in the minds of the framers, between covering only *some* of the 'Cases' to which 'the United States' or 'a State' might be 'a Party'—namely, those which were 'Controversies,' or civil suits—and covering 'all Cases,' whether civil or criminal, in the categories preceding these in the section. Nothing else was involved; certainly nothing else was expressed ....

CROSSKEY, *supra*, at 614; *see also* John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 220 (1997) (explaining that the Framers included the term "all" simply to make unmistakably clear that federal jurisdiction extended to both civil and criminal proceedings in such "cases"). Indeed, as discussed below, during the Constitutional Convention, the Committee on Detail rejected a proposal that would have made federal question jurisdiction mandatory, but diversity jurisdiction subject to congressional regulation. *See infra* at 26-27.

draft proposal that would have extended federal jurisdiction "1. to all cases, arising under laws passed by the general Legislature[,] 2. to impeachment of officers, and 3. to *such* other cases, *as the national legislature may assign*, as involving the national peace and harmony, [*inter alia*] in disputes between citizens of different states." 2 FARRAND'S RECORDS at 146-47 (emphasis added). The committee thus "considered and then rejected a proposal which would have given Congress power to particularize the jurisdiction" of the federal courts. Clinton, *supra*, at 773.

On August 6, 1787, the Committee of Detail reported a draft constitution to the Convention. After providing in its first section that "[t]he Judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as shall, when necessary, from time to time, be constituted by the Legislature of the United States," and providing in its second section for tenure "during good behavior" and undiminished compensation, this draft identified the scope of the federal jurisdiction in a third section as follows:

> *The Jurisdiction of the Supreme Court* shall extend to all cases arising under laws passed by the Legislature of the United States; to all cases affecting Ambassadors, other Public Ministers and Consuls; to the trial of impeachments of Officers of the United States; to all cases of Admiralty and maritime jurisdiction; to controversies between two or more States, (except such as shall regard Territory or Jurisdiction) between a State and

> Citizens of another State, between Citizens of different States, and between a State or the Citizens thereof and foreign States, citizens or subjects. In cases of impeachment, cases affecting Ambassadors, other Public Ministers and Consuls, and those in which a State shall be party, this jurisdiction shall be original. *In all the other cases before mentioned, it shall be appellate, with such exceptions and under such regulations as the Legislature shall make. The Legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States) in the manner, and under the limitations which it shall think proper, to such Inferior Courts, as it shall constitute from time to time.*

2 FARRAND'S RECORDS at 186-87 (emphasis added).

On August 27, the Convention made a number of important amendments to this draft provision, three of which made clear that although Congress could allocate the judicial power between the Supreme Court and any inferior federal courts it chose to create, it could not eliminate all federal jurisdiction over any of the specified cases and controversies. Perhaps most importantly, the Convention considered and rejected a motion to insert, after the specification of the Supreme Court's original jurisdiction, language providing that "[i]n all the other cases before mentioned the judicial power shall be exercised in such manner as the Legislature shall direct." 2 FARRAND'S RECORDS at 425, 431. Thus, the delegates clearly considered but rejected a

proposal that would have permitted broad legislative control over federal jurisdiction. "A clearer rejection of congressional authority over judicial powers is hard to imagine." Clinton, *supra*, at 791.

The Convention next voted unanimously to strike the entire last sentence of this section, which would have authorized Congress to "assign any part of the jurisdiction above mentioned ... in the manner, and under the limitations which it shall think proper, to such Inferior Courts, as it shall constitute from time to time." *See* 2 FARRAND'S RECORDS at 425, 431. Any inference that this language may have created supporting congressional authority to curtail federal jurisdiction was thus eliminated.

To be sure, the Convention did not eliminate the provision authorizing Congress to make exceptions to the Supreme Court's appellate jurisdiction. It did, however, change the draft language at the beginning of the section that would have extended "the jurisdiction of the Supreme Court" to the enumerated cases and controversies to provide instead that "[t]he Judicial Power" shall extend to these cases and controversies. *Id.* at 425, 431. The Convention thus made clear that the Exceptions Clause authorized only exceptions to the Supreme Court's appellate jurisdiction, not to the federal judicial power as a whole.

4. The state ratification debates likewise support a mandatory reading of Article III. Indeed, "the antifederalist attacks on the breadth of the judicial power of the United States prescribed by the Constitution and on the costs, inconvenience, and potential threat to state courts posed by article III produced almost no suggestions by federalists that Congress could delimit the sphere of federal court

jurisdiction." Clinton, *supra*, at 810. To the contrary, as discussed above, *see supra* at 23-24, leading Framers and supporters of the proposed Constitution, including Alexander Hamilton, acknowledged that the federal jurisdiction set forth in Article III was mandatory, *see, e.g.*, THE FEDERALIST No. 82, at 494 (Hamilton); THE FEDERALIST No. 81, at 485 (Hamilton).

Nor did any of the amendments proposed in the state ratifying conventions seek to give Congress broad control of the federal courts' jurisdiction. Rather, the Antifederalists proposed amendments that ranged from abolishing diversity jurisdiction altogether, to eliminating original diversity jurisdiction in cases at common law, to restricting it to cases involving a minimum amount in controversy. *See* Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 499-503 (1928).[4] That the Antifederalists uniformly sought to achieve these goals by constitutional amendment underscores the common understanding that such restrictions could not be enacted by statute. None of the amendments designed to restrict the scope of federal jurisdiction, including diversity jurisdiction, succeeded in the First

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[4] Of special interest here, Massachusetts proposed to limit diversity jurisdiction to matters in which the dispute exceeded three thousand dollars for the Supreme Court and fifteen hundred dollars for the inferior federal courts. 1 ELLIOT'S DEBATES at 323. New Hampshire proposed that all diversity cases be brought exclusively in state courts with an appeal to the Supreme Court only in common law actions involving three thousand dollars or more. *Id.* at 326.

Congress. To the contrary, "the Federalists won a complete victory." *Id.*, at 503.

5. We recognize, of course, that the First Congress did not fully vest in the federal courts all of the cases and controversies enumerated in Article III. Most relevant here, the Judiciary Act of 1789 limited the diversity jurisdiction to cases where the amount in controversy exceeded five hundred dollars. *See* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78-79. The first Judiciary Act also limited diversity jurisdiction to controversies where one of the parties was a citizen of the State where the suit was brought and barred jurisdiction over suits brought by the assignee of "any promissory note or other chose in action," except "foreign bills of exchange" unless the federal courts would have had jurisdiction "if no assignment had been made." *Id.* Removal jurisdiction was likewise subject to a five hundred dollar amount-in-controversy requirement, and was limited to cases where the defendant was a citizen of a State other than that where the action was brought. *See id.* § 12, 1 Stat. 79-80.[5]

While these limitations imposed by the First Congress constitute, of course, "weighty evidence of [the] true meaning" of Article III and, therefore, of congressional authority to control the jurisdiction of

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[5] In addition, as discussed above, *see supra* at 5-6, the Supreme Court construed the 1789 Act to require complete diversity of citizenship, *see Strawbridge*, 7 U.S. (3 Cranch) at 267, even though it subsequently recognized that Article III imposes no such requirement, *see Tashire*, 386 U.S. at 531. There is no evidence that the First Congress intended to impose a complete diversity requirement, however; to the contrary, the language of the 1789 Act was in this respect essentially identical to that of Article III.

the federal courts, *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888), they are hardly dispositive. There is substantial evidence that "in the First Congress, certain of the Constitutional provisions relating to these matters [federal courts] were not scrupulously regarded." CROSSKEY, *supra*, at 618. Indeed, the First Congress's compliance with Article III was demonstrably imperfect in at least some respects: for example, Congress plainly exceeded its constitutional authority, perhaps inadvertently, in purporting to extend federal jurisdiction to all cases, subject to a jurisdictional minimum, in which "an alien is a party." Judiciary Act of 1789, § 11, 1 Stat. at 78. The Supreme Court had to interpret this provision narrowly to apply only "to suits *between citizens and foreigners*" in order to comport with the plain language of Article III. *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12, 14 (1800); *see also Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 304 (1809). In addition, this Court famously determined that the First Congress improperly attempted to expand the original jurisdiction of the Supreme Court. *See Marbury*, 5 U.S. (1 Cranch) at 173-76.

6. We also acknowledge that this Court implicitly upheld the constitutionality of one of the First Congress's statutory limitations on the diversity jurisdiction not long after it was adopted. In *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8 (1799), an assignee challenged the provision restricting jurisdiction in cases of assignment on the ground that its suit was "between citizens of different states," as prescribed by Article III, and that the statute "imposed a limitation upon the judicial power, not warranted by the constitution." *Id.* at 9. Although the Court's opinion did not address this argument, it relied on the statute in

holding that the circuit court lacked jurisdiction over the case. *Id.* at 10. The Court thus implicitly held that this limitation on the jurisdiction prescribed by Article III was constitutional. The report of this decision, moreover, records the following statement by Justice Chase, a staunch antifederalist, during oral argument:

> The notion has frequently been entertained, that the federal courts derive their judicial power immediately from the constitution; but the political truth is that the disposal of the judicial power (except in a few specified instances) belongs to congress. If congress has given the power to this court, we possess it, not otherwise[;] and if congress has not given the power to us, or to any other court, it still remains at the legislative disposal. Besides, congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the federal courts, to every subject, in every form, which the constitution might warrant.

Id. at 10 n.1. A half century later, this Court relied on this comment in expressly upholding the constitutionality of the same statutory limitation. *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448-49 (1850).

* * *

It is not our purpose to urge the Court to reexamine here the soundness of its precedents upholding the constitutionality of Congress's longstanding practice of restricting "the judicial power of the United States" vested by Article III.

For regardless of what the mandatory reading of Article III set forth above may suggest about the constitutionality of statutes restricting the diversity jurisdiction, it surely counsels against the *judiciary's* expanding statutory exceptions to the judicial power beyond their clear terms. And it plainly forecloses the rule, relied on by the court below, that "Federal courts must strictly construe the federal removal statute and resolve any ambiguities about federal jurisdiction in favor of remand," Pet. App. 4, let alone reliance on transparent artifice, such as the carefully hedged and likely invalid stipulation offered by respondent in this case, to defeat federal jurisdiction.

This Court should, accordingly, take this opportunity not only to reject respondent's machinations to defeat federal jurisdiction, but also to reaffirm that no presumption requires that a thumb be placed on the scale against removal and that any such presumption would be improper. As this Court has explained before,

> the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction.

Wecker, 204 U.S. at 186. More generally, this Court should instruct the federal judiciary that it may no more sanction a scheme to evade its duty to decide cases falling within the diversity jurisdiction than it may do so with respect to any other type of case. In the famous words of Chief Justice Marshall, the federal courts "have no more right to decline the

exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." *Cohens v. Virginia*, 19 U.S. 264, 404 (1821).

CONCLUSION

For the foregoing reasons, amicus curiae respectfully submits that this Court should reverse the district court's order remanding this case to Arkansas state court.

Respectfully submitted,

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October 29, 2012

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
DEC 5 - 2012
OFFICE OF THE CLERK

No. 11-1450

IN THE

Supreme Court of the United States

THE STANDARD FIRE INSURANCE COMPANY,
Petitioner,

v.

GREG KNOWLES,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICI CURIAE PUBLIC CITIZEN, INC., AND PUBLIC JUSTICE, P.C., IN SUPPORT OF RESPONDENT

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December 2012

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INTEREST OF AMICI CURIAE[1]

Public Citizen, Inc., is a consumer advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and the courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public. Public Justice, P.C., is a national public interest law firm that specializes in precedent-setting litigation designed to advance consumers' and victims' rights, workers' rights, civil rights and civil liberties, clean air and clean water, preservation of the civil justice system, and protection of the poor and powerless.

Both Public Citizen and Public Justice have represented named plaintiffs in class actions, but have also advocated on behalf of absent class members to ensure that the class action mechanism respects their right to due process. Public Citizen, for example, was co-counsel for the petitioner in *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011), which held that absent class members cannot be bound by resolution of a putative but uncertified class action. Similarly, Public Justice was counsel for the appellees in *Drelles v. Metro. Life Ins. Co.*, 357 F.3d 344 (3d Cir. 2003), which held that class members who opted out of a class action could not be enjoined from pursuing

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[1] Written consents from both parties to the filing of amicus curiae briefs in support of either party are on file with the Clerk. This brief was not authored in whole or in part by counsel for a party. No person or entity other than amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief.

their own cases because of a settlement. And both organizations' attorneys often represent class members objecting to proposed class action settlements that threaten improperly to infringe on the absentees' rights through certification that does not comport with Rule 23's requirements, due process violations, or substantive terms that unreasonably compromise their claims and provide relief of little to no value. For example, Public Citizen represented absent class members in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), *In re Katrina Canal Breaches Litig.*, 628 F.3d 185 (5th Cir. 2010), *Bowling v. Pfizer, Inc.*, 132 F.3d 1147 (6th Cir. 1998), *Wilson v. DirectBuy, Inc.*, No. 3:09-CV-590, 2011 WL 2050537 (D. Conn. May 16, 2011), and *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052 (C.D. Cal. 2010). Cases where Public Justice has represented absent class members objecting include *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292 (S.D. Fla. 2007), *In re Cincinnati Radiation Litig.*, 187 F.R.D. 549 (S.D. Ohio 1999), and *Boyd v. Bell Atlantic-Maryland, Inc.*, 887 A.2d 637 (Md. 2005).

Public Citizen and Public Justice submit this brief because the position advocated by petitioner Standard Fire, while purporting to be based on protection of interests of absent class members, in fact is unnecessary to achieve that end and would undermine the interests of all class members. To be sure, the strategic litigation decisions made by a lead plaintiff and her counsel at the class certification stage may sometimes reveal that the named plaintiff and class counsel do not adequately represent the class as a whole. But that question is entirely separate from the question whether the action brought by the named plaintiff falls within the scope of federal jurisdiction. The

named plaintiff's decision to limit the amount in controversy on behalf of the class to avoid federal jurisdiction is a factor properly considered by state courts in determining whether that plaintiff is an adequate representative of the class she seeks to represent, not a choice that can properly be second-guessed by a federal court as a jurisdictional matter. A blanket rule disregarding such limitations, moreover, would disregard strategic choices that may in many instances serve the interests of class members and enhance their ability to obtain meaningful relief through the class action device.

In addition, Public Citizen and Public Justice have an interest in the proper interpretation of the jurisdictional provisions of the Class Action Fairness Act (CAFA), which were intended not only to facilitate federal jurisdiction over large, multistate class actions, but also to limit the extent to which state court jurisdiction over class actions not of national concern would be displaced. The interpretation of CAFA advanced by amicus curiae National Association of Manufacturers—which, contrary to the position of the petitioner and every court to have interpreted CAFA, posits that CAFA's removal provision, 28 U.S.C. § 1453, contains no amount-in-controversy requirement—would radically alter the framework Congress created, contrary to the structure, language, purposes, and intent of the statute.

SUMMARY OF ARGUMENT

The rights of absent class members are not diminished, nor are absent class members improperly bound to litigation choices made by others, when a federal court declines to accept jurisdiction over an uncertified class action in which the named plaintiff

has stipulated to limit the class's total recovery to no more than $5 million—the amount-in-controversy threshold established by CAFA for the expanded diversity jurisdiction it creates over class actions. *See* 28 U.S.C. § 1332(d)(2). Until the class is certified, an absent class member cannot be bound by its outcome and thus is free to seek greater relief through some other action. Disregarding the stipulation for purposes of determining jurisdiction is therefore not necessary to protect the interests of absent class members. Although absent class members might make different decisions than the named plaintiff if they were to pursue their claims independently, *the action filed by the named plaintiff*—which is the one that must satisfy CAFA's jurisdictional requirements—seeks to recover no more than $5 million and thus falls outside of federal jurisdiction.

The named plaintiff's stipulation to limit the class's recovery is properly viewed not as a matter to be second-guessed by a federal court in determining the existence of jurisdiction, but as a consideration for the state trial court when determining whether the plaintiff is an adequate representative for the class—a question that is, in the first instance, a matter of state procedural law and, ultimately, a matter of due process. Regardless of how that question may eventually be answered, there is no original or removal jurisdiction under CAFA over a putative class action that, at the time of removal, seeks a recovery that does not exceed CAFA's jurisdictional threshold. Nothing in CAFA abrogates the well-established principle that the status of the complaint at the time of removal, and not hypothetical, future events, governs the jurisdictional analysis.

Moreover, it is by no means the case that a waiver of recovery exceeding $5 million necessarily renders a class representative inadequate by failing to serve the interests of the class as a whole. As this case demonstrates, an adequate class representative could legitimately choose to waive only $25,000 of potential recovery for the class to enable litigation in a forum that, in the judgment of the representative and his counsel, may be more appropriate for the case. To conclude that the matter in controversy necessarily exceeds $5 million because of the possibility that a state court might not certify a class with the stipulation in place would confuse the adequacy of representation analysis with the jurisdictional inquiry.

The Court should also reject the argument of amicus curiae National Association of Manufacturers (NAM) that the damages stipulation is irrelevant for purposes of removal jurisdiction under CAFA. NAM argues that because 28 U.S.C. § 1453, which governs removal procedures in CAFA cases, does not expressly refer to the amount-in-controversy requirement of 28 U.S.C. § 1332(d)(2), § 1453 must be read as an unambiguous authorization of removal jurisdiction over any class action, regardless of the amount in controversy. NAM's argument that the Court must read § 1453 in isolation from the jurisdictional limits of § 1332(d) disregards the structure and express purposes of CAFA, of which both § 1453 and § 1332(d) are integral parts, as well as critical language in § 1453 and § 1332(d), and legislative history, that directly contradicts NAM's reading. Read in context, § 1453 is hardly an unambiguous authorization of removal jurisdiction over all class actions regardless of jurisdictional amount. Rather, its function is not to create an independent basis for removal

jurisdiction, but to alter removal procedures that would otherwise apply under 28 U.S.C. §§ 1441(b), 1446 and 1447. Moreover, § 1453 is in no way comparable to other statutes cited by NAM authorizing removal of cases outside the scope of original *federal question* jurisdiction in circumstances where claims and defenses will implicate federal laws and interests that favor adjudication in a federal forum.

ARGUMENT

I. The Stipulation's Potential Effect on Absent Class Members is Properly Taken Into Account at the Class Certification Stage and Is Not a Proper Consideration for Jurisdictional Purposes.

Before absent class members may be bound in a suit for money damages, due process requires that they receive notice of the litigation and be afforded an opportunity either to participate in the action or to opt out of the class. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Further, due process "requires that the named plaintiff at all times adequately represent the interests of the absent class members." *Id.* (citation omitted). "The adequacy inquiry ... serves to uncover conflicts of interest between named parties and the class they seek to represent. [A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *Amchem Prods., Inc.*, 521 U.S. at 625-26 (citations omitted; brackets in original).

These due process principles are incorporated in both the Federal Rules of Civil Procedure and in state procedural rules authorizing class actions. Thus, the Arkansas Rules of Civil Procedure, which

govern the conduct of proceedings in the state courts where this action was originally brought, permit certification of a class only where "the representative parties and their counsel will fairly and adequately protect the interests of the class." Ark. R. Civ. P. 23(a)(4); *see also Valley v. Nat'l Zinc Processors, Inc.*, 217 S.W.3d 832, 837 (Ark. 2005) (holding class certification improper because of inadequate representation). Indeed, even before Arkansas' rules explicitly incorporated the requirement of adequate representation, the Supreme Court of Arkansas had recognized that a finding of adequate representation is essential to certification of a class and that trial courts have a "continuing duty ... to ensure that the class is adequately represented throughout the litigation." *First Nat'l Bank of Fort Smith v. Mercantile Bank of Jonesboro*, 801 S.W.2d 38, 41 (Ark. 1990). Critical to the determination of adequacy is the absence of "evidence of collusion or conflicting interest between the representative and the class," *BPS Inc. v. Richardson*, 20 S.W.3d 403, 408 (Ark. 2000), and that the named plaintiff be sufficiently qualified and interested in the litigation "to ensure vigorous prosecution of the action." *First Nat'l Bank*, 801 S.W.2d at 41.

Under these standards, a stipulation by the named plaintiff limiting the recovery sought on behalf of the class would be a factor for the court to weigh at the certification stage when deciding whether the named plaintiff is an adequate class representative. If the stipulation were not in the best interests of the class, thereby reflecting a conflict between the named plaintiff and the interests of the class, the court would deny certification for lack of an adequate class representative. For example, in *Frelin v. Oakwood Homes Corp.*, No. CIV-2001-53-3, 2002

WL 31863487 (Ark. Cir. Ct. Nov. 25, 2002), an Arkansas trial court declined to certify a class in part on the basis of inadequate representation where "for tactical litigation reasons Plaintiffs and their class counsel have attempted to limit recovery for each member of the ... Class to an amount less than $75,000," and where one of the named plaintiffs did not know that this choice had been made, and others conceded either that they did not know whether the limitation was in the interest of other class members or that the limitation might well be of concern to other class members. *Id.* at *19. The court found that, under the circumstances of the case, "[t]his attempt to limit the ... [c]lass's monetary claims creates potential antagonism between these representative Plaintiffs, and the class which they seek to represent." *Id.*[2]

That a court might ultimately find a particular named plaintiff to be an inadequate representative in part because of a stipulation limiting the total recovery of a class, however, means only that a class ultimately may not be certified. It does not mean that the limitation on potential recovery is ineffective or does not exist. Speculation about the possibility that a state court might find the putative class representative's agreement to limit recovery renders him inadequate thus provides no basis for holding that a

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[2] Federal courts applying the standards of Federal Rule 23 have in some cases similarly held that a plaintiff's "failure to seek full recovery" evidences a conflict with the interests of the absentees that would render her an inadequate representative. *Martin v. Home Depot USA, Inc.*, 225 F.R.D. 198, 203 (W.D. Tex. 2004) (denying motion for class certification).

federal court may assert jurisdiction over an action in which the necessary amount in controversy is not being sought. Rather, those concerns are properly taken into account when the state court decides whether certification is appropriate under state procedural law and consistent with due process. That the stipulation is not binding, at this stage of the litigation, on absent class members has no bearing on whether it establishes to a legal certainty that the potential classwide recovery in *this* action, brought by *this* plaintiff, is less than $5 million. Put another way, the possibility that a state court might decide not to certify a class on the basis that the stipulation renders Knowles an inadequate representative does not transform this action into one in which more than $5 million is in controversy.[3]

The proper approach is exemplified by decisions in which federal courts addressing motions to remand class actions removed from state courts have declined to consider the propriety of litigation choices made by putative class representatives that have the effect of limiting classwide recovery, instead leaving it to state courts to consider those choices in evaluating whether the named plaintiff is an adequate class

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[3] Standard Fire contends that the district court erred by holding that it lacked jurisdiction because of an "eventual application by a state court of judicial estoppel." Pet. Br. 32 n.8. To the contrary, the district court invoked judicial estoppel in support of its finding that the stipulation was a limitation on damages that was enforceable against Knowles *at the time* the complaint was filed and thus established to a legal certainty that the action did not meet CAFA's jurisdictional threshold. Pet App. 11a.

representative. *See, e.g., Thomas v. Countrywide Home Loans*, No. 3:11-CV-399, 2012 WL 527482, at *4 n.4 (M.D. Ala. Feb. 17, 2012) (noting that the "ethical ramifications" of plaintiff's limitation on class-wide recovery "need not be examined within the confines of the present motion to remand."); *In re Citric Acid Antitrust Litig.*, No. C-95-4578, 1996 WL 116827, at *6 n.7 (N.D. Cal. Mar. 12, 1996) (finding that argument regarding plaintiff's ability to limit class claims "presents an issue of the adequacy of representation ... but does not affect the [c]ourt's jurisdictional analysis"); *Quebe v. Ford Motor Co.*, 908 F. Supp. 446, 453 (W.D. Tex. 1995) (remanding to state court but noting that plaintiff's "failure to request punitive damages might possibly prevent the certification of the present case as a class action"); *Four Way Plant Farm, Inc. v. Nat'l Council on Comp. Ins.*, 894 F. Supp. 1538, 1544 (M.D. Ala. 1995) (holding that state court should consider plaintiffs' decision to plead only state antitrust claims in deciding whether to certify a class or how to define a class).

A stipulation limiting class damages should be analyzed similarly. For example, in *Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827 (7th Cir. 2011), a case on which Standard Fire relies, Judge Easterbrook, writing for the court, observed that a stipulation limiting damages to an amount less than the jurisdictional threshold would, if binding under state law and filed with the complaint, suffice to prevent removal. *Id.* at 831. At the same time, the court noted that, as putative class representative, the plaintiff "has a fiduciary duty to its fellow class members." *Id.* at 830. Thus, if the named plaintiff were willing to "throw away" a major component of damages, "a state or a federal judge might insist that

some other person, more willing to seek [those] damages, take over as representative." *Id.* at 830-31. But the court emphasized that "[o]ur point is not that a federal judge should take steps to keep suits in federal court" where such a stipulation has been filed, "but that class representatives' fiduciary duty might ensure that the amount in controversy exceeds $5 million no matter where the litigation occurs." *Id.* at 831. Other courts have likewise analyzed damages stipulations as a question of adequacy of representation to be considered by the state court in determining whether to certify a class rather than ignoring the stipulations on the ground that they necessarily reflect inadequate representation.[4]

A rule that courts must disregard damages stipulations when considering CAFA jurisdiction based on concern for absentees not only confuses the adequacy-of-representation inquiry with the distinct question whether the action as pleaded meets the amount-in-controversy requirement, but also wrongly presumes that a stipulation limiting the class's recovery necessarily violates the representative's duty to the class. Although an adequate representative

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[4] *See, e.g.*, *Lowdermilk v. U.S. Bank N.A.*, 479 F.3d 994, 999 n.5 (9th Cir. 2007) (noting that a stipulation may undermine plaintiff's case for serving as class representative); *McClendon v. The Chubb Corp.*, No. 2:11-CV-02034, 2011 WL 3555649, at *5 (W.D. Ark. Aug. 11, 2011) (providing that a plaintiff's decision to limit recovery for the class should be addressed after remand at the class certification stage); *Murphy v. Reebok Int'l, Ltd.*, No. 4:11-CV-214, 2011 WL 1559234, at *3 (E.D. Ark. Apr. 22, 2011) ("Reebok's attack on the [damages] stipulations goes more to [plaintiff's] adequacy as a class representative ... [and] can be addressed after remand.").

will often seek to maximize the class's recovery, he will not always do so. An adequate representative might choose to limit damages to maintain the action in a state court because the state court is a more appropriate forum from the standpoint of the class for any number of legitimate reasons. The class representative may wish to remain in a court where there are different class certification standards, where judges are more familiar with the state common-law or statutory claims at issue, where a "rocket docket" will ensure a faster resolution of the case, or where discovery will be broader or, conversely, more limited. And the price of achieving the benefits of the chosen forum may in some cases be relatively insubstantial.

Here, for example, the district court found, based on Standard Fire's submissions, that the amount in controversy if the stipulation were disregarded—calculated based on the assumptions that attorneys' fees would be 40 percent on top of the class's recovery and that the class would receive prejudgment interest if it prevailed—was "up to $5,024,150," barely clearing CAFA's jurisdictional threshold. Pet. App. 8a. Under such circumstances, forgoing $24,150—less than half of one percent of the total amount Standard Fire claims the class claims are worth, and possibly coming out of the generous fee award assumed by Standard Fire rather than the class's damages award—to gain the legitimate benefits afforded by the choice of a state court forum may well be in the best interests of the class.

Standard Fire incorrectly argues that giving effect to the stipulation at the jurisdictional stage is tantamount to recognizing Knowles's authority to reduce claims on behalf of the absent class in violation of

this Court's holding in *Smith* and the due process principles articulated in *Shutts*. The Court in *Smith*, applying the "basic premise of preclusion law" that a non-party to a suit is not bound by a court's judgment, 131 S. Ct. at 2379, held that an absent class member may not be bound by the judgment in an uncertified class action (including the decision not to grant certification). *See id.* at 2380-82. Here, no court has even considered the issue of class certification. But giving effect to Knowles's stipulation limiting damages for the purpose of assessing federal jurisdiction over this action does not bind non-parties to any ruling or judgment, or even to the stipulation itself, and is thus fully consistent with *Smith*. Absent members of the putative class remain free to proceed independently to seek whatever recovery they may wish to seek. Indeed, noting the possibility of an absent class member's intervention in this action to seek damages in excess of Knowles's limitation, Pet. Br. 37, Standard Fire implicitly acknowledges that, prior to class certification, the stipulation cannot impede absent class members who want to proceed differently with litigation of their potential claims.

Nor does stipulating to a limitation on the amount in controversy work a due process violation on absent class members. *Shutts* makes clear that the notice, opt-out, and adequate representation requirements protect the due process rights of absentees in class actions seeking monetary relief. *Shutts*, 472 U.S. at 811-12. Thus, until a state court determines that Knowles is an adequate class representative, certifies a class, and notifies absent class members, the class will not be bound to an action that limits classwide damages to less than $5 million. And even after class certification, absentees may opt out

of the suit if they do not want to be bound by the named plaintiff's litigation choices. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559 (2011); *Shutts*, 472 U.S. at 812-13 (1985). Far from being violated by the stipulation, *Smith* and *Shutts* provide the necessary assurance that class members cannot be bound by a stipulation limiting the amount in controversy unless and until the state court determines that the named plaintiff is an adequate representative, certifies the class, and provides notice and an opportunity to opt-out. Disregarding the stipulation for purposes of jurisdiction is therefore not necessary to protect absent class members.

If, following remand, the state court determines that Knowles is an adequate representative, the stipulation will then be operative to limit the recovery in this action of absent class members who do not opt out (assuming that it is not overturned on appeal within the state court system, where it will be subject to review). If, however, the state court determines that the stipulation renders Knowles an inadequate class representative, the court will deny class certification. Whichever way the issue of the adequacy of Knowles's representation is resolved, *this* action will not be subject to removal under CAFA. Of course, if another plaintiff were to file a class action without a damages limitation, and if the claims alleged were valued at more than $5 million, Standard Fire could remove *that* action to federal court under CAFA.

Generally, "the status of the case as disclosed by the plaintiff's complaint is controlling in the case of a removal." *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 291 (1938). CAFA does not authorize courts to import adequacy or other class certifica-

tion considerations into the determination whether federal jurisdiction exists. To hold otherwise would disrespect the choices that plaintiffs make in crafting their cases, including limitations on damages, to select a forum within the framework established by CAFA. Although CAFA's enactment significantly expanded federal jurisdiction over class actions, Congress's allowance of a federal forum in certain cases cannot override a plaintiff's choice to prosecute a class action in state court by pleading it in a way that falls outside federal jurisdiction.

II. Removal of a Class Action Under CAFA Requires That the Action Satisfy §1332(d)'s Requirements for Original Jurisdiction, Including the Amount-in-Controversy Requirement.

Advocating a novel reading of the statute that Standard Fire itself does not advance and that finds no support in any judicial decision construing CAFA, amicus curiae NAM contends that there is federal jurisdiction over this case regardless of the stipulation because CAFA removal requires no amount in controversy. NAM contends that 28 U.S.C. § 1453, the provision of CAFA that governs the procedures for removal of class actions, provides an independent basis for federal removal jurisdiction over class actions, regardless of whether they satisfy the requirements for original jurisdiction under CAFA as set forth in 28 U.S.C. § 1332(d). According to NAM, the plain language of § 1453 allows removal of any "class action" as defined in § 1332(d)(1), without regard to whether it meets the amount-in-controversy requirement of § 1332(d)(2) or any of the other limitations on federal jurisdiction set forth in § 1332(d).

NAM's argument misreads the statute by requiring the Court to ignore its structure and purpose, as well as critical statutory language that contradicts NAM's interpretation. Moreover, as NAM itself confesses, under its interpretation of the statute, a key requirement for removal—the presence of at least minimal diversity among the parties as required by Article III—was unaccountably left out of § 1453, requiring NAM to step back from its own plain language argument by reading into the statute terms that are not there. NAM's reliance on the "unambiguous" meaning of the statutory text thus falls flat.

A. The Structure, Purpose, and Plain Language of CAFA Make Clear that the Jurisdictional Requirements Set Forth in § 1332(d) Limit the Scope of CAFA Removal Jurisdiction.

CAFA's jurisdictional provisions were enacted, as Congress stated in the findings and purposes section of the Act, to "provid[e] for Federal court consideration of *interstate cases of national importance* under diversity jurisdiction." Pub. L. No. 109-2, § 2(b)(2), 119 Stat. 5 (2005), 28 U.S.C. § 1711 note (emphasis added). Congress achieved these purposes by expanding diversity jurisdiction under 28 U.S.C. § 1332(d) to provide the district courts with jurisdiction over large, multistate class actions meeting the detailed criteria set forth in that subsection. That expanded original jurisdiction automatically carried with it an expansion in removal jurisdiction under 28 U.S.C. § 1441(a), which provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district

and division embracing the place where such action is pending." Because § 1441(b), which otherwise prevents removal by in-state defendants, and 28 U.S.C. §§ 1446 and 1447, which govern procedures applicable to cases removed under § 1441, contained limitations that Congress thought inappropriate for class actions, CAFA added a new section, 28 U.S.C. § 1453, to alter the procedural requirements that would otherwise be applicable under Chapter 89 of Title 28 to class actions removed in light of CAFA's expanded diversity jurisdiction.

Critically, the newly enacted provisions of 28 U.S.C. § 1332(d) not only expand federal jurisdiction over class actions involving diverse parties, but also impose key limitations on that expansion. Paragraph (1) of subsection (d) defines a "class action" as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or other similar State statute." Paragraph (2) then grants the district courts original jurisdiction over any class action as so defined in which the amount in controversy exceeds $5 million and the parties are minimally diverse. Paragraph (3) defines a number of circumstances in which a federal court nonetheless may decline to exercise jurisdiction, while paragraph (4) defines cases in which a federal court *must* decline to exercise jurisdiction. Class actions where the primary defendants are state governments or officials, or that comprise fewer than 100 members are excluded from CAFA jurisdiction entirely, § 1332(d)(5), as are class actions involving certain securities or corporate governance claims, § 1332(d)(9). Paragraphs (6) and (7) instruct how the amount in controversy and citizenship of parties are to be determined for purposes of CAFA jurisdiction. Paragraph (8) provides that original CAFA jurisdic-

tion applies to uncertified class actions. Paragraph (10) defines the citizenship of unincorporated associations for purposes of CAFA's diversity requirement. And paragraph (11) provides that, under defined conditions, a "mass action" in which individual claims are consolidated for trial "shall be deemed to be a class action *removable under paragraphs (2) through (10)* if it otherwise meets the provisions of those paragraphs." (emphasis added).

Section 1453, in turn, incorporates § 1332(d)(1)'s definition of "class action." Section 1453(b) then provides that removal of a "class action" is subject to the procedures outlined in 28 U.S.C. § 1446, but that three limitations ordinarily imposed on removal of diversity actions do not apply: (1) a class action, unlike other actions "removed ... on the basis of jurisdiction conferred by section 1332," 28 U.S.C. § 1446(c), may be removed more than one year after it is commenced, as long as removal is effected within 30 days of the first filing that reveals the existence of federal jurisdiction; (2) in a class action, a defendant who is a citizen of the forum state may nonetheless remove;[5] and (3) a defendant need not obtain consent of its co-defendants in order to remove an action. Section 1453(c) further alters the procedures after removal, otherwise set forth in § 1447, by allowing permissive interlocutory appeals of orders granting or denying motions to remand. Finally, section

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[5] This provision alters the otherwise applicable requirement of § 1441(b) that in a case where removal is based on diversity jurisdiction, the defendants must not be citizens of the forum state.

1453(d) provides that the provisions of § 1453 do not apply to the same types of securities and corporate governance class actions that are excluded from CAFA jurisdiction under § 1332(d)(9).[6]

The most natural reading of § 1453, in light of the statutory purpose to allow federal jurisdiction of nationally important multistate class actions and the carefully reticulated provisions of § 1332(d) that define and limit that jurisdiction, is that it alters the limitations that would otherwise apply under Chapter 89 of Title 28 to the removal under § 1441(a) of actions within the expanded original jurisdiction provided by §1332(d).

NAM, however, argues that § 1453 is not simply a provision that alters some of the details of removal jurisdiction, but a "stand-alone removal provision for class actions." NAM Br. 7. Because § 1453 says that a class action "may be removed" and does not reference the substantive provisions of § 1332(d), including the matter in controversy requirement of § 1332(d)(2), NAM argues "that Congress did not wish to limit removal under CAFA to those cases within the federal courts' original jurisdiction." NAM Br. 13. NAM is wrong.

When interpreting a statute, the Court looks first to the words chosen by Congress to determine "whether the language at issue has a plain and unambiguous meaning with regard to the particular

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[6] Subsection (d) thus appears to have the effect of excluding from the provision for interlocutory appeal orders remanding class actions involving securities and corporate governance claims.

dispute in the case." *Roberts v. Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1356 (2012) (citation omitted). In so doing, the Court does not look at words in isolation; rather, a "fundamental canon of statutory construction [is] that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Id.* at 1357 (citation omitted).

NAM's argument depends on reading § 1453 in isolation from all of § 1332(d) but its definitions. But because § 1332(d) and § 1453 are part of the same Act, and both seek to serve the same purpose of allowing federal jurisdiction over multistate class actions, it makes little sense to read § 1453 as providing a new source of federal jurisdiction over class actions that is wholly independent of the limits imposed by § 1332(d). That the two provisions are intended to be read hand in hand is confirmed by, among other things, the cross-reference to § 1453 in § 1332(d)(10), which provides that both provisions will use the same definition of the citizenship of an unincorporated association.

Moreover, NAM's reading fails to recognize that the key language on which it relies—the opening phrase of section 1453(b)—does not say that "any class action may be removed"; it says that "[*a*] *class action* may be removed to a district court of the United States *in accordance with section 1446*" and then excepts such removals from otherwise applicable limits. The language is most naturally read as defining *how* a class action—otherwise removable under §§ 1441(a) because it falls within the original jurisdiction created by § 1332(d)—"may be removed," not as independently defining *whether* the action "may be removed." Thus, when the "plain language" of

§ 1453 is read in the context of the other provisions of Chapter 89 of Title 28, as well as of § 1332(d), it takes on a meaning entirely opposite to that posited by NAM.

NAM's reading also fails to account for critical language in § 1453(b) itself. That subsection states that § 1446 applies to class action removals "except that the 1-year limitation under section 1446(b) shall not apply." But that one-year limit *only* applies when a case is "removed on the basis of jurisdiction conferred by section 1332 of this title." 28 U.S.C. § 1446(b). Accordingly, if § 1453 truly created "stand-alone" removal jurisdiction *not* tied to § 1332, there would be no need to create an "exception" to the one-year limit for class actions because the limit would not apply anyway.

Similarly, § 1453(b)'s specification that a case may be removed "without regard to whether any defendant is a citizen of the State in which the action is brought" creates an exception to the otherwise applicable terms of § 1441(b), which (except in federal question cases) limits removal under § 1441(a) to cases where the defendants are not citizens of the forum state. Again, however, if § 1453 created an entirely independent basis for removal, without regard to the existence of original jurisdiction, the limits imposed by § 1441 would not be applicable, and there would be no need to exclude them.

NAM's argument also asks the Court to ignore language in § 1332(d) itself that confirms that Congress intended § 1332(d)'s provisions to limit removal jurisdiction as well as original jurisdiction. Specifically, § 1332(d)(11)(A) provides that certain "mass actions" will be deemed to be "class actions *remova-*

ble under paragraphs (2) through (10)." (emphasis added). This language confirms that Congress intended that the requirements of paragraphs (2) through (10) of § 1332(d) determine not only when a class action is within the federal courts' original jurisdiction, but also when it is "removable."

NAM's attempt to harmonize § 1332(d)(11)(A) with its interpretation of § 1453 is unavailing. NAM contends that paragraph (11)(A) means that a mass action is deemed to be a class action if it satisfies the "substantive requirements of § 1332(d)(2)-(10)" and that such a mass action is, therefore, removable under § 1453. NAM Br. 19. But that reading is not based on the words that Congress enacted. NAM construes the language as if it said "a 'mass action' that satisfies the requirements of paragraphs (2) through (10) is deemed to be a class action removable under § 1453." In fact, the provision states that a "mass action" is a "class action removable under paragraphs (2) through (10)"—language that indicates that paragraphs (2) through (10) define the circumstances where *class actions* are removable. Divorcing the adjectival phrase from the noun that it modifies, NAM's construction "impermissibly rearranges the statutory language," *Limtiaco v. Camacho*, 549 U.S. 483, 490 (2007) and renders the modifier setting forth the criteria for removability "inoperative." *See Corley v. United States*, 556 U.S. 303, 314 (2009) (holding that statutory constructions that render any part of a statute "inoperative or superfluous, void or insignificant" are to be avoided).

The more natural reading of § 1332(d)(11)(A) is that "removable under paragraphs (2) through (10)" modifies "class action," the noun that immediately precedes the adjectival phrase. The phrase thus

makes clear that paragraphs (2) through (10), which limit a federal court's exercise of original CAFA jurisdiction, also determine whether removal jurisdiction is available under CAFA, because such jurisdiction, for class actions as well as for other diversity actions, depends on the existence of original jurisdiction.

NAM's plain-language argument not only fails to account for critical language in both § 1453 and § 1332(d), but also posits a gaping hole in §1453: the failure to specify any limit on federal jurisdiction over class actions, not even the minimal diversity required by Article III. Thus, if § 1453 were a stand-alone grant of federal jurisdiction, it would lack the key requirement necessary to determine when it could and could not constitutionally be applied, as NAM itself acknowledges. NAM Br. 20-21 & n.5. To avoid this significant flaw in its reading, NAM suggests that the Court read half of 1332(d)(2)—its minimal diversity requirement—into § 1453, but not the other half—its amount-in-controversy requirement. That NAM's argument by its own admission requires selectively reading into the statute something that, on NAM's view of the statute, is plainly not there belies the notion that NAM's construction is required by the plain language of the statute.

Rather than adopting a reading under which § 1453 is a defective stand-alone jurisdictional provision that requires major surgery to save it, the Court should adopt the much more natural reading that the language, structure, and purposes of CAFA all support: namely, that § 1453 modifies certain limitations and procedures that would otherwise apply to removal of a class action but leaves intact the basic requirement of § 1441(a) that removal is limited to cas-

es satisfying the limitations on original jurisdiction under CAFA, as set forth in § 1332(d). *See United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme ... because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.").

If any doubt remains, CAFA's legislative history confirms that removal under § 1453 is subject to the limits on original CAFA jurisdiction set forth in §§ 1332(d)(2)-(10). The Senate Report on the version of CAFA enacted in 2005 states unequivocally that section 5 of CAFA, which contained § 1453, "establishes the *procedures* for removal of *interstate class actions over which the federal court is granted original jurisdiction in new section 1332(d).*" S. Rep. No. 109-14, at 48 (2005) (emphasis added). The Report goes on to state that "[t]he general removal provisions currently contained in Chapter 89 of Title 28"—including the basic grant of removal jurisdiction tied to original jurisdiction in § 1441(a)—"would continue to apply to class actions, except where they are inconsistent with the provisions of the Act." *Id.* The Report underscores the point that § 1441(a), with its requirement of original jurisdiction, continues to apply by immediately noting that § 1441(b), which otherwise limits removal under § 1441(a) in diversity cases to cases where defendants are not citizens of the forum state, "would not apply to the *removal of*

class actions under the jurisdictional provisions of section 1332(d)." Id. (emphasis added).[7]

Elsewhere, the Senate Report is replete with references to removal of class actions pursuant to the jurisdictional provisions of § 1332(d), expressing the understanding that § 1332(d)'s jurisdictional requirements, including the minimum amount in controversy, govern federal removal jurisdiction. *See* S. Rep. No. 109-14, at 42 (2005) (discussing the amount in controversy in removed cases); *id.* at 50 (stating that removals pursuant to § 1453 can happen "at any time when changes are made to the pleadings that bring the case within section 1332(d)'s requirements for federal jurisdiction"); *id.* at 70 (discussing the amount in controversy requirement with respect to CAFA's removal provision).

Similarly, the Report explains that the provisions of § 1332(d)(4), which provide that a federal court "shall decline to exercise jurisdiction" in certain cases where a single state's interests predominate, were designed to "respond to concerns that class actions with a truly local focus should not be *moved to federal court* under this legislation because state courts have a strong interest in adjudicating such disputes." *Id.* at 39 (emphasis added). By contrast, the Report explains, in a case falling outside § 1332(d)(4)'s limi-

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[7] Although it appears that the 2005 Senate Report was not prepared until after CAFA's enactment, all of the statements from the 2005 Report that are cited herein are matched by identical or substantially similar statements in the penultimate Senate Report on CAFA prepared in the immediately preceding Congress. *See* S. Rep. No. 108-123 (2003).

tations, "any defendant could *remove* [the] case to federal court." *Id.* at 41 (emphasis added). Likewise, the Report explains that the purpose of § 1332(d)(5)(a), excluding cases involving state governmental defendants from CAFA jurisdiction, is "to prevent states, state officials, or other governmental entities from dodging legitimate claims by *removing* class actions to federal court and then arguing that the federal courts are constitutionally prohibited from granting the requested relief." *Id.* at 42 (emphasis added). None of these statements would make sense if the drafters did not understand that removal jurisdiction under CAFA required satisfaction of § 1332(d)'s limits on original jurisdiction.

That Congress intended CAFA's removal jurisdiction to be coterminous with its original jurisdiction is underscored by the statutory objective to "correct[] a flaw in the current diversity jurisdiction statute" by allowing large, interstate class actions to be heard by federal courts. *Id.* at 5. Congress specifically described CAFA as making more, but not all, class actions removable. *See id.* at 6 (establishing in CAFA "a rule allowing a larger number of class actions into federal courts"); *id.* at 51-52 (citing a study analyzing proposed removal provision to conclude that more than half of class actions in which state courts issued rulings during a five-year period would *not* be removable under CAFA). Indeed, even a commentator whom NAM cites in its brief recognizes that CAFA's purpose and legislative history are inconsistent with NAM's argument. *See* Adam N. Steinman, *Sausage-Making, Pigs' Ears, and Congressional Expansions of Federal Jurisdiction: Exxon Mobil v. Allapattah and its Lessons for the Class Action Fairness Act*, 81 Wash. L. Rev. 279, 292-93 (2006). That no advocate

of CAFA before or after its enactment expressed an intent to provide for removal of all class actions, without regard to original CAFA jurisdiction, and that no court has thought to interpret § 1453 as NAM does in the seven years since CAFA's enactment underscore that NAM's interpretation of § 1453 is untenable.

B. Section 1453 Is Wholly Unlike Other Stand-Alone Removal Provisions Cited by NAM.

NAM cites several statutes that provide for removal jurisdiction over cases that are not subject to original federal jurisdiction as support for its argument that § 1453 expands CAFA removal jurisdiction to include cases over which CAFA does not grant original jurisdiction. NAM Br. 16-18. Each of those statutes, unlike § 1453, expressly provides for broad removal jurisdiction to protect or promote a substantive federal interest, usually one calling for the application of federal law as a defense to liability. Section 1453 is a different sort of statute altogether, as it sets forth *procedures* for removal and remand of class actions over which there is original jurisdiction, rather than defining types of actions or litigants that may be removed without regard to original jurisdiction because of a predominating federal interest.

For example, 28 U.S.C. § 1442 provides federal officers with the right to remove both civil and criminal cases arising out of actions taken under color of their office. Section 1442 was enacted to permit federal officials to raise defenses "arising out of their duty to enforce federal law," such as official immunity, in federal court. *Willingham v. Morgan*, 395 U.S. 402, 407 (1969); *see also Mesa v. California*, 489 U.S. 121, 129 (1989) (colorable defense under federal law is re-

quired for jurisdiction under § 1442). These statutes allow the exercise of jurisdiction based on the existence of a federal question for which there is an overriding interest in providing a federal forum, but where original federal question jurisdiction under 28 U.S.C. § 1331 is absent because the federal question is not part of the plaintiff's case and does not appear on the face of a well-pleaded complaint. *See Mesa*, 489 U.S. at 136-37. Jurisdiction under § 1442a, which provides members of the United States armed forces with a federal forum for actions taken under color of their office, is predicated on the same principles. *See Mir v. Fosburg*, 646 F.2d 342, 344 (9th Cir. 1980) (finding no relevant distinction between purpose of § 1442 and § 1442a).

Similarly, an interest in enforcement of federal civil rights laws animates the broad removal provisions of § 1443, applicable to state criminal and civil cases in which a defendant is denied federal rights or is prosecuted or sued for acts authorized by civil rights laws. *See Georgia v. Rachel*, 384 U.S. 780, 804 (1966) (upholding removal of state criminal prosecutions of civil rights protestors under § 1443 where there were grounds for a "firm prediction that the defendant would be 'denied or cannot enforce' the specified federal rights" [of equality] in state courts). In the case of removal of actions affecting property liens held by the United States under § 1444, Congress provided the federal government with a right to a federal forum in exchange for its waiver of sovereign immunity from suit by private parties to determine the priority of outstanding liens on real or personal

property.[8] *Hussain v. Boston Old Colony Ins. Co.*, 311 F.3d 623, 629 (5th Cir. 2002).

These removal statutes, each of which provides a federal forum where one would not have been otherwise available, are designed to protect federal officers or members of the military who may be immune from civil or criminal liability, to prevent critical rights from being undermined by state prosecutions or lawsuits, and to address the consequences of the United States' waiver of sovereign immunity in actions affecting its security interests in real or personal property. In each case, the whole point of the statute would be lost and the important federal interests underlying it compromised if it were not read to allow removal jurisdiction in the absence of original jurisdiction.

NAM fails to identify a similar federal interest necessitating its broad construction of § 1453. Rather, the purposes of CAFA are given their full intended effect, and the language of both § 1453 and 1332 are respected and given meaning, if § 1453 is read simply as modifying the requirements and procedures for removal of the large, multistate class actions over which § 1332(d) provides original jurisdiction. Indeed, NAM itself acknowledges that § 1453 serves important functions even if not read as a stand-alone grant of jurisdiction, including outlining

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[8] 28 U.S.C. § 2410(a) provides that the United States may be named as a party "in any State court" in actions to quiet title to, foreclose upon, partition, condemn, or for interpleader with respect to, any real or personal property in which the United States holds a lien.

"procedures a defendant must follow to accomplish removal" and "provid[ing] a procedure for discretionary interlocutory appeal of a district court's order remanding a class action removed to state court." NAM Br. 7-8. The structure and procedural focus of § 1453 are very different from those of removal statutes that expand federal jurisdiction. The existence of such statutes provides no justification for tearing § 1453 from its context within CAFA, ignoring important language in both § 1453 and § 1332, and positing that Congress in enacting § 1453 unintentionally created a basis for removal of any class action, regardless of its satisfaction of CAFA's important jurisdictional limits.

CONCLUSION

For the foregoing reasons, the decision of the district court should be affirmed.

Respectfully submitted,

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December 2012

AMICUS CURIAE BRIEF

No. 11-1450

Court, U.S.
FILED
OCT 29 2012
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

THE STANDARD FIRE INSURANCE COMPANY,
Petitioner,

v.

GREG KNOWLES, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED WITHIN THE STATE OF ARKANSAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF 21ST CENTURY CASUALTY COMPANY, 21ST CENTURY INSURANCE COMPANY, 21ST CENTURY INSURANCE COMPANY OF THE SOUTHWEST, AND 21ST CENTURY INSURANCE GROUP AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF 21ST CENTURY CASUALTY COMPANY, 21ST CENTURY INSURANCE COMPANY, 21ST CENTURY INSURANCE COMPANY OF THE SOUTHWEST, AND 21ST CENTURY INSURANCE GROUP AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

Amici Curiae—21st Century Casualty Company, 21st Century Insurance Company, 21st Century Insurance Company of the Southwest, and 21st Cen-

[1] This brief was authored by *amici* and its counsel listed on the front cover, and was not authored in whole or in part by counsel for a party. No one other than *amici* or its counsel has made any monetary contribution to the preparation or submission of this brief. *Amici* have the consent of the parties to file this brief as indicated by the blanket consents filed by both Petitioner and Respondent.

tury Insurance Group (collectively "21st Century")—are insurance companies which market under the service mark of Farmers Insurance Group of Companies.

21st Century has been hailed into the Circuit Court of Miller County, Arkansas in the case styled *Basham et al. v. American Nat'l Ins. Co. et al.* ("*Basham*"), despite not having done business within the State of Arkansas during the purported class period. However, in violation of its due process rights, 21st Century has never been afforded an opportunity to be heard regarding its lack of jurisdictional contacts with Arkansas. And, as this Brief will show, 21st Century has scant hope of ever having its rights vindicated in Miller County.

Basham has followed a similar procedural trajectory as the instant case ("*Knowles*"). Many of the same plaintiffs' counsel filed both cases and asserted that they seek less than $5 million dollars in damages for the purported class. In both cases, after removal to federal court, the Western District Court of Arkansas remanded the case in reliance upon the purportedly binding nature of the stipulation.[2] *Basham* is now being held by the Eighth Circuit Court of Appeals pending this Court's decision in *Knowles*. 21st Century, thus, has a vested interest in the outcome of this case.

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[2] Unlike the instant case, the *Basham* plaintiffs did not even attach a signed, sworn stipulation. Instead, plaintiffs merely have relied on assertions in their complaint that they will not seek in excess of $5 million dollars.

SUMMARY OF THE ARGUMENT

21st Century writes separately not to re-tread the legal arguments ably made by Petitioner or by other *amici* in their briefing, but to offer this Court a unique, on-the-ground perspective regarding the manner in which the Eighth Circuit's reflexive remand practice operates to defeat the purposes of the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) ("CAFA"), and to violate the due process rights of both absent putative class members and class action defendants.[3] 21st Century's counsel of record gained this experience directly as lead counsel for 21st Century and other insurance companies which market under the service mark of Farmers Insurance Group of Companies that have been hailed into Miller County, Arkansas.[4]

This Court's decision in *Phillips Petroleum Co. v. Shutts* set forth three requirements for a binding class judgment: (1) notice, (2) an opportunity to be heard and participate in the litigation, and (3) a class representative who adequately represents the class at all times. 472 U.S. 797, 811–12 (1985). *Shutts* teaches that, absent these requirements, a class judgment will not have res judicata effect against

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[3] Counsel have attempted to provide this Court with a distilled but adequate record of events through the appendix, recognizing that a complete production of the records involved would be excessively voluminous.

[4] In particular, 21st Century's counsel also represented Farmers Insurance Company, Inc., Farmers Insurance Exchange, Texas Farmers Insurance Company, Inc. and Farmers Group, Inc. ("Farmers") as lead counsel in the *Chivers* case discussed later in this Brief. *Evelyn J. Chivers, et al. v. State Farm Fire & Cas. Co. et al.*, No. CV-2004-294-3, in the Circuit Court of Miller County, Arkansas.

absent class members. *Id.* at 805. Thus, class action defendants have standing to raise not only their own due process challenges but also those of the absent class. *Id.*

To remand defendants back to State court on the basis of a stipulation that does not and cannot bind absent class members heightens the predicament defendants already face in Miller County. Their chances of ever reaching a final judgment or even a decision on class certification or other dispositive motions are miniscule due to the practice of deferring and delaying all dispositive or appealable judgments while allowing plaintiffs to conduct oppressive discovery. Defendants are also faced with the prospect that even if a final judgment were to be reached, it would not have res judicata effect and they could be subject to endless relitigation.

This is precisely the problem Congress intended to remedy with CAFA, Pub. L. No. 109-2, 119 Stat. 4. In order to avoid violating the due process rights of both the absent putative class members and defendants, and undermining the purposes of CAFA, this Court should conclude that Respondent's "stipulation" does not defeat jurisdiction in the federal courts under CAFA.

ARGUMENT

I. Absent putative class members are not bound by the named plaintiff's stipulation as to damages unless the requirements set forth in *Phillips Petroleum Co. v. Shutts* are met.

21st Century agrees with Petitioner's argument that a named plaintiff cannot limit the claims of absent putative class members before class certifica-

tion. Absent putative class members are not parties to the putative class action. *Devlin v. Scardelletti*, 536 U.S. 1, 16 n.1 (2002) (describing "argument that a nonnamed class member is a party to the class-action litigation *before the class is certified*" as "novel and surely erroneous") (emphasis in original); *see also Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2382 (2011) (stating that "the mere proposal of a class . . . c[an] not bind persons who were not parties . . . .").

To hold otherwise—particularly in the context of limiting recovery—would violate the procedural due process rights of the absent putative class members. U.S. CONST. amend. XIV, §1. As this Court has previously ruled, "[i]f [a] forum State wishes to bind an absent plaintiff concerning a claim for money damages . . . [t]he plaintiff must receive notice plus an opportunity to be heard and participate in the litigation." *Shutts*, 472 U.S. at 811–12. In addition to these two requirements, the named plaintiff must "at all times adequately represent the interests of the absent class members." *Id.* at 812. The stipulation of a named plaintiff in a putative class action cannot bind absent class members because they have neither received notice nor been given an opportunity to participate in the litigation. Moreover, the stipulation itself weighs against a finding that the named plaintiff is adequately representing the absent putative class members.

This inability to bind absent class members also undercuts the Eighth Circuit's view that the stipulation of a named plaintiff would be afforded judicial estoppel effect in State court sufficient to ensure that the amount in controversy remained below $5 million. *See Rolwing v. Nestle Holdings, Inc.*, 666 F.3d 1069, 1072 (8th Cir. 2012) ("[W]e conclude that

the stipulations are independently enforceable under the doctrine of judicial estoppel . . . .").[5]

As this Court has explained, the doctrine of judicial estoppel provides that "[w]here ***a party*** assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position . . . ." *Zedner v. United States*, 547 U.S. 489, 504 (2006) (emphasis added) (citing *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)).

Judicial estoppel, thus, cannot bind absent putative class members because they are not parties to the remand proceeding. To hold otherwise would violate the absent putative class members' due process rights to have their claims heard. U.S. CONST. amend. XIV, §1; *Cf. Taylor v. Sturgell*, 553 U.S. 880, 892–93 (2008) ("The application of claim and issue preclusion to nonparties . . . runs up

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[5] Following the Eighth Circuit's lead, the Western District of Arkansas routinely cites judicial estoppel as an alternate basis to remand, including the underlying district court opinion of the instant case. *Knowles v. Standard Fire Ins. Co.*, 4:11-CV-04044, 2011 WL 6013024, at *4 (W.D. Ark. Dec. 2, 2011) ("Plaintiff would also be judicially estopped from asserting a claim in state court for attempting to recover more than the amount contemplated in the stipulation."); *see also, Goodner v. Clayton Homes, Inc.*, 4:12-CV-04001, 2012 WL 3961306, at *3 (W.D. Ark. Sept. 10, 2012) ("Plaintiffs respond that they are judicially estopped from amending their stipulations. The Court agrees."); *Basham v. Am. Nat. County Mut. Ins. Co.*, 4:12-CV-04005, 2012 WL 3886189, at *5 (W.D. Ark. Sept. 6, 2012) ("[T]hat result is foreclosed in this case by judicial estoppel . . . ."); *Oliver v. Mona Vie, Inc.*, 4:11-CV-04125, 2012 WL 1965613, at *2 (W.D. Ark. May 31, 2012) ("Moreover, judicial estoppel would prevent any attempt by the Plaintiff to thwart his stipulations upon remand.").

against the 'deep-rooted historic tradition that everyone should have his own day in court.'") (citing *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996)).

II. Defendants in a putative class action have an interest in obtaining a valid and enforceable judgment that actually binds the members of the putative class.

Further, violation of the due process rights of absent putative class members affects not only their rights but also the interests of defendants. As this Court recognized in *Shutts*:

> Whether it wins or loses on the merits, [a class action defendant] has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as [the defendant] is bound. The only way a class action defendant . . . can assure itself of this binding effect of the judgment is to ascertain that the forum court has jurisdiction over every plaintiff whose claim it seeks to adjudicate, sufficient to support a defense of res judicata in a later suit for damages by class members.

Shutts, 472 U.S. at 805.

To have personal jurisdiction over these putative class members, they would have to be afforded the "minimal procedural due process protection," which includes "that the named plaintiff at all times adequately represent the interests of the absent class members." *Id.* at 811–12.

Where the named plaintiff has already bargained away the class's potential recovery, there is good reason to believe that this due process requirement

has not been met. *See, e.g. Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830 (7th Cir. 2011) ("A representative can't throw away what could be a major component of the class's recovery."); *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 724 (5th Cir. 2002) ("[I]t is improbable that [plaintiff] can ethically unilaterally waive the rights of the putative class members to attorney's fees without their authorization.").

Thus, current Eighth Circuit precedent leaves class action defendants, like Petitioner and 21st Century, with valid cause to question whether any judgment ultimately obtained would have res judicata effect on the claims of the absent putative class members. "[Defendants] could be subject to numerous later individual suits by these class members because a judgment issued without proper personal jurisdiction over an absent party . . . has no res judicata effect as to that party." *Shutts*, 472 U.S. at 805.

Moreover, the Eighth Circuit's reflexive practice of remanding cases based upon a non-binding stipulation consigns defendants to Miller County: a venue where they are subjected to mountainous discovery and endless delays with little hope of the case progressing to an appealable ruling on class certification or a binding final judgment. The fear that any judgment rendered—after years of litigating in a forum that does not even enjoy personal jurisdiction over 21st Century—would not have res judicata effect, thus forcing defendants to re-live the same nightmare, only reinforces the quagmire defendants face in Miller County.

III. Respondent's suggestion that the *Shutts* requirements will be met in conjunction with a certification hearing is a fallacy.

In the instant case, Respondent will argue that the requirements of *Shutts* will be addressed and satisfied at the class certification stage.[6] The problem—one which the undersigned counsel have faced before in Miller County—is that certification will be delayed indefinitely until each defendant is forced to the settlement table in an effort to avoid further crippling discovery. This is precisely the problem that Congress intended to remedy with CAFA, and it is a violation of a class action defendant's due process rights under the Fourteenth Amendment.

A. Congress enacted CAFA, in part, to protect class action defendants from "magnet" jurisdictions.

In passing CAFA, Congress was motivated in part to curb the "[a]buses of the class action device that have . . . harmed . . . defendants that have acted responsibly." Pub L. No. 109-2 § 2(a)(2). Particularly troublesome to Congress were those "magnet" jurisdictions in which plaintiffs' counsels understood they could extract maximum bounty from defendants while undergoing minimal to no scrutiny from the presiding State court. 151 CONG. REC. S1225-02 (Feb. 10, 2005) (statement of Sen. Vitter) ("There is now in our country a full blown effort aimed at min-

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[6] The underlying district court opinion of this case also relied on this argument. *Knowles v. Standard Fire Ins. Co.*, 4:11-CV-04044, 2011 WL 6013024, at *6 (W.D.Ark. Dec. 2, 2011) ("[P]utative class members may simply opt out of the class and pursue their own remedies if they feel that the limitations placed on the class by Plaintiff are too restrictive.").

ing for jackpots in sympathetic courts known as 'magnet courts' for the favorable way they treat [class action] cases."); *see also* 151 CONG. REC. H723-01 (Feb. 17, 2005) (statement of Rep. Sensenbrenner) (noting that "[a] major element of the worsening crisis is the exponential increase in State class action cases in a handful of 'magnet' or 'magic' jurisdictions").

Knowles and *Basham* arise out of one of those "magnet" jurisdictions—the Circuit Court of Miller County, Arkansas. Nan S. Ellis, *The Class Action Fairness Act of 2005: The Story Behind The Statute*, 35 J. LEGIS. 76, 93 & n.115 (2009) ("The most famous magnet jurisdictions are Madison County, Illinois and Miller County, Arkansas."). Indeed, in 2006, Miller County received the dubious distinction of being recognized by the American Tort Reform Foundation as a potential "judicial hellhole." Am. Tort Reform Found., *Judicial Hellholes* 2006, at v, 22 (2006), available at http://bit.ly/LE8gxJ.

Despite CAFA, Miller County has remained a "magnet" jurisdiction where plaintiffs' counsel extract vast sums in attorneys' fees from battered defendants while providing little to no benefit to the putative class members. That both Petitioner and 21st Century were hailed into Miller County is not a coincidence—legions of corporate defendants continue to find themselves unable to escape the pull of this magnetic jurisdiction.[7]

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[7] *See, e.g., Oliver v. Mona Vie, Inc.*, 4:11-CV-04125, 2012 WL 1965613 (W.D. Ark. May 31, 2012) (remanding case back to Miller County); *Nicholas v. Am. Modern Home Ins. Co.*, CV-2011-0270-2 (Circuit Court of Miller County, Ark. April 24, 2011) (another putative class action filed by Respondent's trial counsel in Miller County).

Miller County's lasting prominence even after CAFA, is fostered by allowing the "stipulation" of the named plaintiff to subvert the amount-in-controversy requirement. The gambit is simple: named plaintiffs plead allegations that far exceed a damage calculation of five million dollars, but purport to stipulate that they will not seek damages in excess of five million dollars. Per Eighth Circuit precedent, this stipulation shields them from removal to federal court.

Once remanded back to Miller County, plaintiffs then impose crushing discovery on defendants, knowing defendants have no recourse to interlocutory appeal. All the while, named plaintiffs and the court delay any decision on threshold issues (such as the standing of the named plaintiff or personal jurisdiction over the defendants) and on class certification, thereby subjecting defendants to a bleak future of unending and expensive discovery.

The ability to defeat federal jurisdiction for class actions "in which the matter in controversy exceeds the sum or value of $5,000,000," 28 U.S.C. § 1332(d)(2), merely by stipulating (or only alleging) that plaintiffs will not seek damages in excess of $5 million runs counter to Congress's intention that CAFA "expand substantially Federal court jurisdiction over class actions" and that "its provisions should be read broadly, with a strong preference that interstate class actions be heard in a federal court if properly removed by any defendant." 151 Cong. Rec. H723-01 (Feb. 17, 2005) (statement of Rep. Sensenbrenner); *id.* ("[I]f a Federal court is uncertain about whether the $5 million threshold is satisfied, the court should err in favor of exercising jurisdiction over the case.").

B. Defendants' due process rights are also violated when forced to defend in Miller County.

Nowhere is the protection afforded by CAFA removal more vital to out-of-state insurance defendants than in Miller County, where they are routinely subjected to endless delays and unconscionably burdensome and expensive discovery, without a meaningful judicial remedy. Once trapped there by mere allegations (the merits of which are never tested), and without hope of a ruling on class certification (much less a trial), such defendants are forced to impale themselves on Morton's Fork: expending millions of dollars in complying with ever more vexatious discovery demands (and sanctions when unable to comply with them) when even the highly improbable outcome of an eventual judgment affords no true final relief, or capitulating in settlements conferring grossly inflated awards of attorneys' fees to plaintiffs' counsel out of all proportion to the merits of their claims. Not only are defendants' rights under CAFA to be free of such evils through removal defeated, but their fundamental right to due process of law is denied.

21st Century understands that the instant case is not a referendum on the practices of Miller County. However, given that Congress enacted CAFA at least in part to curb the recognized abuses of magnet jurisdictions such as Miller County, and given that these "stipulations" have become the *de rigueur* method of side-stepping CAFA, 21st Century believes that an on-the-ground perspective of the abuses that continue to transpire in Miller County adds important context to this Court's analysis of the question before it. While federal courts recognize

defendants' constitutional right to be heard in a meaningful manner and their right to protection from gross discovery abuses, Miller County does not.

A bedrock principle of due process is the right "to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Class action defendants in Miller County do not receive this right because dispositive motions regarding threshold issues are endlessly delayed and often never heard.

Federal courts recognize that the failure to rule on dispositive pre-trial motions is an abuse of discretion. *See, e.g., Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997) ("Failure to consider and rule on significant pretrial motions before issuing dispositive orders can be an abuse of discretion."); *In re Sch. Asbestos Litig.*, 977 F.2d 764, 793 (3d Cir. 1992) ("[A] district court's failure to consider the merits of a summary judgment motion is a failure to exercise its authority when it has the duty to do so.").

Indeed, the Third Circuit has recognized that the failure to rule on a motion can be more devastating to a party's rights than an erroneous ruling because the failure to rule precludes judicial review. "[R]eview after final judgment cannot force a district judge to adjudicate, and interlocutory appeal is unlikely to be available . . . ." *In re Sch. Asbestos Litig.*, 977 F.2d at 793. Thus, the procedural mechanisms that protect defendants' rights are absent when the trial court fails to issue an appealable ruling. This is precisely what occurs in Miller County. Class action defendants file dispositive threshold motions only to have them deferred time and again. Absent a reviewable

ruling, defendants have no avenue by which to vindicate their rights.

In the rare instances when dispositive motions are actually heard, the timing of the hearing is such that it loses any meaning, such as when motions to dismiss are not heard until the day of the certification hearing, as is the practice in Miller County. Due process does not just require a right to be heard. It requires a right to be heard "at a *meaningful* time and in a *meaningful* manner." *Mathews*, 424 U.S. at 333 (emphasis added); *see also Washington v. Kirksey*, 811 F.2d 561, 564 (11th Cir. 1987) ("Due process of law does not allow the state to deprive an individual of property where the state has gone through the mechanics of providing a hearing, but the hearing is totally devoid of a meaningful opportunity to be heard.").

Compounding the injustice, defendants are not merely left to idle in judicial limbo while their pretrial motions languish. Instead, they are bludgeoned with gross discovery abuses. This Court has previously acknowledged the threat that abusive discovery poses in the absence of an opportunity to have meritless claims dismissed. "[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [summary judgment] proceedings." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007). Thus, this Court recognized that Rule 8 pleading requirements must be given weight "lest a plaintiff with 'a largely groundless claim' be allowed to 'take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.'" *Id.* at 558 (citing *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)).

This Court's concerns are routinely played out in real time in Miller County. Dispositive threshold issues such as venue, jurisdiction, and standing are cast to the side, and even the most innocent defendant must consider seriously whether to pay millions of dollars to plaintiffs' attorneys in order to avoid expending even more in defense and discovery compliance costs. The Eleventh Circuit has recognized that court-condoned discovery abuses can "materially prejudice[]" a "litigant's rights" and constitute "an abuse of discretion." *Chudasama*, 123 F.3d at 1367.

C. The Miller County court's management of the *Basham* action.

The experience of 21st Century in *Basham* is instructive of the practices in Miller County. *Basham* had its origins in another putative class action filed in Miller County in 2005, which was styled *Georgia Hensley, et al. v. Computer Sciences Corporation, et al.*, Case No. 2005-59-3 ("*Hensley*"). Named plaintiffs in *Hensley* alleged a nationwide conspiracy to underpay bodily injury claims under the UM/UIM (uninsured and underinsured motorist) coverage of automobile policies. *Hensley* included 584 insurance company defendants.

In June 2008, James Basham became a named plaintiff in *Hensley*. On June 11, 2008, Basham's claims, along with those of two other plaintiffs, were severed into what became the *Basham* case. On January 31, 2010, James Basham—who was then the only named plaintiff remaining—died. Basham's counsel—many of whom were also Respondent's trial attorneys—did not reveal this critical fact, and the defendants did not discover it until an obituary from the local newspaper was sent to one of the defendant's attorney's attention in June 2010. In July 2010,

one of Respondent's trial counsel admitted this was not disclosed for strategic reasons:

> ***For strategic reasons*** and because there was no obvious efforts to find out that information, ***we didn't disclose it*** to [defendant's counsel] and she's correct, and to the extent that is considered inappropriate, I apologize to her, I apologize to the court as well, but ***we don't believe that it is inappropriate*** to do so.

(emphasis added)[8] Thus, for approximately six months, the putative class action had continued despite the death of the only named plaintiff, and would continue two months more before Basham's estate was finally substituted as the named plaintiff in September 2010.

Having extracted their pound of flesh from nearly all of the original *Hensely* defendants, on February 7, 2011, six years after the case began as *Hensley*—a First Amended Class Action Complaint was filed under seal in *Basham* which, for the first time, named 21st Century. A protective order entered *ex parte* accompanied the complaint.

On September 16, 2011, the Miller County court entered (1) a protective order to preserve documents during the pendency of the litigation,[9] and (2) a scheduling order,[10] virtually identical in form and substance to those proposed by plaintiff's counsel.[11]

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[8] Appendix at M, Hearing Transcript, 7/1/10, p. 81a

[9] Appendix at C, Protective Order to Preserve Documents During Pendency of Litigation, 9/16/11, p. 10a.

[10] Appendix at B, Initial Scheduling Order, 9/16/11, p. 17a.

[11] The protective order was entered ten days ***before*** the deadline for 21st Century to oppose plaintiff's motion for entry of

The protective order included the onerous requirement that "the Chief Executive Officer, Chief Operating Officer or President" of 21st Century certify under oath that a copy of the order had been provided to "all of its officers, agents, employees and representatives who are known to have or would reasonably be expected to have possession of or access to Documents to be Preserved,"[12] thus exposing such high-ranking executives to potential sanctions and charges of perjury for certifying that actions took place in which they would have no direct involvement and could have no first-hand knowledge. The purpose for such a requirement is clear: to intimidate such top executives into settling to avoid potential personal liability.[13]

The September 16, 2011 scheduling order provided that briefing and hearing on defendants' motions to dismiss for lack of personal jurisdiction or venue would be delayed eight months, and that motions to dismiss on Rule 8, 9, 10, 12(b)(1) and 12 (b)(6)[14]

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that order, thus denying 21st Century the right to be heard. The protective order further recites in its first paragraph that "[t]he parties agreed to the terms set forth below and this Court finds the agreed terms. . .", when in fact 21st Century objected to the executive certification requirement among other terms. Appendix at D, Letter from Stacy Allen to Hon. Kirk D. Johnson, 9/26/11, p. 17a.

[12] Appendix at C, Protective Order to Preserve Documents During Pendency of Litigation, 9/16/11, pp. 14a-15a.

[13] To underscore the point, shortly after 21st Century filed its required certifications, one of Respondent's trial counsel who also represents the plaintiff in *Basham* sent a letter to defendants' counsel threatening a motion to enforce the protective order for lack of compliance. Appendix at E, Letter from Christopher R. Johnson to Defense Counsel Group, 10/25/11, p.19a.

[14] The Arkansas Rules of Civil Procedure are patterned on the Federal Rules of Civil Procedure, and resemble them closely.

grounds would not be heard until the ***same day*** as the class certification hearing.[15] This ruling was in conformity with plaintiff's earlier motion to defer response to those motions to dismiss and the court's own preference for "[t]his model [which] has worked well for the court and parties in the past. . . ."[16] Also consistent with prior practice, the Miller County court emphasized that, despite the delay in hearing (much less ruling on) defendants' motions to dismiss, "[d]iscovery will continue unabated on the merits issues as well as issues relating to the pending motions."[17]

Respondent's trial counsel wasted little time in propounding massive written merits discovery on 21st Century and the other defendants, including 131 interrogatories, 189 requests for production of documents, and a "request for inspection and entry upon land" to physically inspect defendants' data storage facilities and computer systems.[18] This discovery was outrageously overbroad, burdensome and oppressive, seeking all manner of records and information pertaining to the activities of unspecified officers,

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City of Fort Smith v. Carter, 216 S.W.3d 594, 598 (Ark. 2005) ("Based upon the similarities of our rules with the Federal Rules of Civil Procedure, we consider the interpretation of these rules by federal courts to be of a significant precedential value.").

[15] Appendix at B, Initial Scheduling Order, 9/16/11, p. 4a.

[16] Appendix at A, Letter from Hon. Kirk D. Johnson, 8/30/11, p. 2a.

[17] Appendix at A, Letter from Hon. Kirk D. Johnson, 8/30/11, p. 3a.

[18] As this Court has recognized, but Miller County does not: "[D]iscovery, like all matters of procedure, has ultimate and necessary boundaries." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

agents, employees and representatives, not only in Arkansas but across the country, since 1990.[19]

The prejudice to 21st Century was severe, as its motion to dismiss for lack of personal jurisdiction was predicated on the fact (supported by affidavits) that 21st Century "does not insure Arkansas citizens and has not otherwise directed any activity toward the State of Arkansas or otherwise availed itself of the privileges of doing business within the State of Arkansas." 21st Century's predicament was insoluble: waive its personal jurisdiction defense by moving for the affirmative relief of a protective order from the court, knowing that an interlocutory appeal from denial of that motion is unavailable under Arkansas law,[20] or stand on its objections, withhold production, and risk monetary sanctions upon plaintiff's inevitable motion to compel.

On November 14, 2011, *Basham* was voluntarily dismissed by its named plaintiff and then re-filed in

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[19] Significantly, the discovery included an interrogatory asking each defendant to state whether it contended a file-by-file review was necessary to determine the purported underpayment to the putative class members, disclosing plaintiff's counsel's intention to seek production of each and every claim file from any defendant opposing the use of statistical sampling, as they had done in *Chivers* before. Appendix at F, Plaintiffs' First Master Set of Interrogatories, Requests for Production of Documents and Request for Inspection on Defendant Insurance Companies, p. 21a (for the purposes of brevity, 21st Century has included only the set of discovery requests served again when *Basham* was refiled; however, the requests both include this onerous provision); *see also* Section III(D), *infra*, discussing *Chivers* in detail.

[20] *See, e.g.*, *Matter of Badami*, 831 S.W.2d 905, 906 (Ark. 1992) ("An order denying a protective order to quash a subpoena is not a final order for appeal purposes.").

Miller County under Arkansas' saving statute on December 7, 2011, this time naming an additional plaintiff and additional insurance company defendants.[21] Despite having previously been notified that the 21st Century defendants had not conducted the business of insurance in Arkansas during the class period, Respondent's trial counsel nonetheless included 21st Century again as defendants in *Basham*. The latest *Basham* complaint was virtually identical in substance to the one dismissed three weeks earlier, and was served with two sets of discovery virtually identical to those before, including a fourteen-page appendix dictating onerous requirements for the production of electronic data.[22]

The old and new defendants removed *Basham* to the Western District Court of Arkansas. That court's remand order was appealed to the Eighth Circuit Court of Appeals, which is holding its decision pending this Court's resolution of *Knowles*. As alluded to in its description of interest in this appeal, 21st Century knows through its counsel what awaits the

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[21] The additional plaintiff was Freda McClendon, who had previously filed a putative class action in Sebastian County, Arkansas, styled *McClendon, et al. v. The Chubb Corporation, et al.*, No. CV2010—1176 (Sebastian County, Ark.). Defendants in *McClendon* moved to dismiss. As they did in *Basham*, plaintiffs' counsel moved to stay briefing on those motions until after discovery and the filing of a class certification motion. When her motion to stay was denied, McClendon's trial lawyers (who also represent Basham and Respondent) dismissed the Sebastian County action and re-filed in Miller County as the second named plaintiff in *Basham*. Neither James Basham nor Freda McClendon is alleged to have had a policy of insurance issued by 21st Century nor to have had a claim adjusted by 21st Century.

[22] Appendix at F, Plaintiffs' First Master Set of Interrogatories, Requests for Production of Documents and Request for Inspection on Defendant Insurance Companies, p. 21a.

defendants if the use of stipulations to bind absent class members is upheld by this Court and *Basham* is remanded to Miller County. Through their defense of Farmers in the earlier *Chivers* case, 21st Century's counsel has seen how the Miller County "model" for case management operates to stall resolution of defendants' motions to dismiss and of class certification indefinitely, while plaintiffs' withering discovery abuse grinds them into the ground.

D. The future in *Basham* is foretold in *Chivers*.

Like *Basham*, *Chivers* was a putative class action lawsuit filed on September 8, 2004, in Miller County by many of Respondent's same trial counsel against numerous insurance company defendants. *Evelyn J. Chivers, et al. v. State Farm Fire & Cas. Co. et al.*, No. CV-2004-294-3, in the Circuit Court of Miller County, Arkansas. As lead counsel for Farmers, the undersigned filed a motion to dismiss pursuant to Arkansas Rules (12)(b)(3) and 12(b)(6).

As requested by plaintiffs, consideration of those motions was also deferred. Initially, the court indicated it was deferring consideration until it could enter a comprehensive scheduling order.[23] In fact, numerous scheduling orders were ultimately entered by the court, each one further postponing any consideration of many of defendants' motions to dismiss for over ***four years*** until the date of the class certification hearing on June 30, 2009.[24] By the time the last

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[23] Appendix at G, Order, 11/15/04, p. 48a.

[24] Appendix at H, Amended Scheduling Order, 1/10/05, p. 50a; Appendix at I, Parties' Agreed Proposed Revised Case Scheduling Order, 1/27/06, p. 57a; Appendix at J, Amended Scheduling Order, 10/16/07, p. 63a; Appendix at K, Revised Case Scheduling Order, 4/3/09, p. 68a.

defendants settled and were dismissed in 2011, the case had been pending for almost seven years, and Miller County still had not ruled on Farmers' 12(b)(6) motion to dismiss or the issue of class certification.

During those years, Farmers and the other defendants were subjected to mounting pressure to settle by virtue of increasingly burdensome discovery and the threat of sanctions when even Herculean efforts to comply proved unsuccessful. The following are two of the most egregious examples.

Plaintiffs' counsel in *Chivers* forced defendants to choose between two evils: forego the right to individualized proof of damages by consenting to statistical sampling, or expend tremendous amounts of money and effort to produce each and every claim file implicated in a putative nationwide class action extending back for a decade.[25] When Farmers refused to waive its right to object to the introduction of statistical sampling at a merits trial, the Miller County court ordered Farmers to produce ***all*** its claim files at its own expense.[26]

The price paid by Farmers for refusing to waive individualized proof of damages was enormous. To comply with what the court characterized as plain-

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[25] Appendix at L, Order Denying Plaintiffs' Motion for Contempt Order Granting Plaintiffs' Motion to Compel Production of Claim Files, 7/1/09, p. 78a ("The Defendant has elected to contest the validity of the statistical sampling method for damages and it cannot complain now that it will have to comply with reasonable discovery requests as it would in any other case."). Significantly, the court's July 1, 2009 order imposing this monumental discovery burden on Farmers was issued the ***day after*** oral argument on class certification, leaving Farmers with another choice: spend a fortune on settlement or spend a fortune producing claim files.

tiffs' "reasonable discovery requests," Farmers identified, examined, copied and produced approximately 480,772 "paper" claim files and many more electronically stored files.[27] Within five months of the court's order, and well before project completion, Farmers had devoted 28,631 man-hours to produce the required claim files.[28] The cost to Farmers to comply with the court's order included $865,261 of internal costs,[29] over $5.8 million paid to its records vendor Iron Mountain,[30] and over $1.8 million paid to its counsel to review, process and produce the files. By the time production stopped a year later, Farmers had spent ***over $9 million*** to produce over ***55 million pages*** of its claim files.[31] It is inconceivable that a federal district court would have permitted such abusive merits discovery prior to class certification, much less required Farmers to bear the cost.

Having failed to bring Farmers to its knees, Respondent's trial counsel turned to production of emails. Plaintiffs brought a motion for sanctions and contempt against co-defendants Chubb Lloyds Insurance Company of Texas, Chubb Indemnity Insurance Company, Chubb Custom Insurance Company and Chubb National Insurance Company ("Chubb") for the alleged failure to search for and produce emails

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[27] Appendix at N, Affidavit of Christopher Bulger, p. 85a, ¶¶ 8, 10.

[28] Appendix at N, Affidavit of Christopher Bulger, p. 95a, ¶ 43.

[29] Appendix at N, Affidavit of Christopher Bulger, p. 95a, ¶ 43 and n.3.

[30] Appendix at O, Affidavit of Kevin Werwie, p. 106a, ¶¶ 33–34.

[31] Appendix at P, Letter from Jackson Walker L.L.P. to Plaintiffs' Counsel, 7/1/10, p. 107a.

responsive to document requests as overbroad and burdensome as those in *Basham*. In partially granting plaintiffs' motion directed to Chubb (and only Chubb), the Miller County court also ordered that "all Defendants to this litigation comply with the discovery requests for emails pursuant to the findings set forth above within thirty (30) days of this order,"[32] despite the lack of prior notice to Farmers that its interests would also be at issue and in denial of Farmers' due process right to be heard.

Given the many similarities between the tactics employed by Respondent's trial counsel and the Miller County orders in *Chivers* and *Basham*, 21st Century is confident that its motions to dismiss and the issue of class certification will not be ruled on for many years (if ever) were *Basham* to be remanded to that court, and that the *Basham* defendants would be subjected to the same crushing discovery as that in *Chivers*.

CAFA was designed to end abuses such as those inflicted in *Chivers*. Yet Miller County orders and discovery propounded in *Basham* tell us that history is repeating itself. The practice of stipulating to seek an amount below $5 million is an end-run around CAFA's requirements and intentions. The Eighth Circuit's endorsement of this practice creates a set of circumstances whereby plaintiffs' counsel can ensure that no matter the size and national scope of their

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[32] Appendix at Q, Order on Motions for Sanctions and Contempt, 12/21/09, p. 115a. In response to Farmers' January 5, 2010 motion to vacate the application of the December 21, 2009 order to Farmers for denial of due process, the court agreed to rescind that provision. Shortly thereafter, plaintiffs moved against Farmers to compel the same email production extracted from Chubb.

allegations, they will never be forced to prove up the merits of those allegations as they would in a federal district court. 21st Century and its undersigned counsel understand these implications all too well, and respectfully pray that this Court put a stop to the practice of undercutting the relief provided by CAFA.

CONCLUSION

In order to avoid undermining the purposes of CAFA and violating the due process rights of both the absent class members and of defendants, this Court should conclude that Respondent's "stipulation" does not defeat jurisdiction in the federal courts under CAFA.

Respectfully submitted,

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of The Southwest, and
21st Century Insurance Group

October 29, 2012

APPENDIX

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APPENDIX A

[LOGO]

CIRCUIT COURT
Eighth Judicial District - South
STATE OF ARKANSAS

KIRK D. JOHNSON, Judge
Miller County Courthouse
Texarkana, Arkansas 71854
Ph. (870) 774-7722
Fax (870) 774-0008

COUNTES:
Miller
Lafayette

August 30, 2011

Attorneys of Record *Via Email*

Re: James Basham, *et al.* v. American National County Mutual Ins. Co., *et al.* Miller Circuit No. CV-2005-59-3A

Dear Counsel:

In reviewing my schedule for the next few weeks, I noticed that my trial court assistant had scheduled a hearing on September 19, 2011 on a Motion to Dismiss filed by Ms. Fletcher and Mr. Chambers. Due to a back injury and subsequent surgery, I have been in the office only on a very limited basis since June 25, 2011. Ms. Houser, in an effort to assist counsel, set this motion hearing without consulting with the Court.

The Court has found it to be more efficient in class action litigation to take motions in an order which will expedite resolution of many of the initial questions presented. For instance, motions relating to Rule 4, Rule 12(b)(2), Rule 12(b)(3), Rule 12(b)(4),

Rule 12(b)(5), and Rule 12(b)(8) are motions that can be heard relatively early In the litigation. If additional motion hearings are necessary after those hearings are concluded, the Court will schedule remaining motions pursuant to Rule 8, Rule 9, Rule 10, Rule 12(b)(1) and Rule 12(b)(6) at or near the time of class certification hearings. This model has worked well for the court and parties in the past and will be used in this case. Therefore, the settings on these motions are premature and that hearing is hereby cancelled.

To expedite the hearings on the first group of motions, the Court has found that it is desirable to have a scheduling order issued to provide all parties notice of the hearing dates and deadlines which shall be adhered to by the parties. The Court is aware that many of the attorneys in this case have also been counsel in previous class action litigation in this court. The court is puzzled that the experienced attorneys have not presented an agreed scheduling order. The Court can only surmise that the parties have attempted to meet and confer on this issue and have been unsuccessful.

The Court will require the parties to meet and confer before September 12, 2011 to reach agreement on the terms of a scheduling order. The parties will present the agreed order or notify the court that no agreement has been reached on September 13, 2011. If such an impasse occurs, the Court will enter a scheduling order on or before September 19, 2011 for the parties.

The Court will not set these pending motions for hearing until sufficient time for discovery has been allowed on the issues presented in the motions. However, the parties are not to interpret that discovery is

limited to the issues in the pending motions. Discovery will continue unabated on the merits issues as well as issues relating to the pending motions.

Thank you for your immediate attention to this matter.

Sincerely,

/s/ Kirk D. Johnson
Kirk D. Johnson

APPENDIX B

IN THE CIRCUIT COURT OF MILLER COUNTY, ARKANSAS

No 2005-59-3A

JAMES BASHAM,
Individually and as Class Representatives
on Behalf of All Similarly Situated Persons,
Plaintiff,

vs.

AMERICAN NATIONAL COUNTY MUTUAL INS CO, *et al.*
Defendants.

INITIAL SCHEDULING ORDER

This Court requested that the parties meet and confer regarding a potential scheduling order by letter to counsel on August 30, 2011. This Court instructed the parties to submit either an agreed scheduling order or competing orders for this Court's consideration on or before September 12, 2011. This Court understands the parties met but that they were unable to reach an agreement on all terms of a proposed scheduling order.

Thus, after considering the various proposed scheduling orders presented by the parties, this Court makes the following findings and establishes the following deadlines which are to remain intact until further order of this Court:

This Court finds that no defendant's joinder in any joint or group briefs submitted in accordance with this Order or presentation of motions or defenses in

accordance with the schedule established by this Order shall waive any defense or motion. This scheduling order does not restrict the right of any party to proceed with additional motions and hearings.

This Court finds that class certification and merits discovery shall not be bifurcated but shall proceed simultaneously. This Order does not restrict the procession or timing of personal jurisdiction, class certification or merits discovery.

This Court finds that written discovery in this case shall proceed solely through the master set discovery protocol which was utilized previously in this litigation.[1] This Court believes the master set discovery protocol promoted efficiency in the discovery process for the parties and this Court. The master set discovery protocol is as follows:

- Plaintiff is allowed to submit one master set and one follow on set of personal jurisdiction discovery and another independent set of master and follow on discovery for class certification and merits issues to all Defendants without leave of court.
- Defendants may submit one master set and one follow on set of personal jurisdiction discovery and another independent set of master and follow on discovery for class certification and merits issues to Plaintiffs without leave of court.
- There will not be one master set for certification and another master set for merits

[1] The master set discovery protocol is intended to be inclusive of interrogatories, requests for production of documents and requests for admission.

discovery, but one unitary set of master and follow on discovery that will encompass both certification and merits.

Any further written discovery by the parties on any topic may only be propounded after leave of court is obtained.

I. PROTECTIVE ORDER

Oct. 24, 2011	Deadline to file Modified Protective Order Concerning the Confidentiality and Use of Documents and Information Produced in Discovery with the Court or for Defendants to file Motion for Entry of such Protective Order
Nov. 7, 2011	Deadline for Response to any Motion for Modified Protective Order
Nov. 14, 2011	Deadline for Reply on any Motion for Modified Protective Order
November 17, 2011	Hearing on any Motion for Modified Protective Order

II. FIRST MOTION GROUP: Motions to Dismiss Based on Lack of Personal Jurisdiction, Insufficiency of Process, Insufficiency of Service of Process, Improper Venue, and Forum Non Conveniens.

Dec. 16, 2011	Deadline for Defendants to file moving papers

March 2, 2012	Deadline to Complete Discovery relating to first motion group
March 16, 2012	Deadline for Plaintiffs to file response
April 13, 2012	Deadline for Defendants to file reply
May 7, 2012	Hearing date

III. SECOND MOTION GROUP: Motions to Dismiss pursuant to Rules 8(a), 9(b), 12(b)(1) or 12(b)(6), Motions to Sever, Motions to Compel Arbitration and Primary Jurisdiction.

Aug. 10, 2012	Deadline for Defendants to file moving papers
Sept. 14, 2012	Deadline for Plaintiffs to file response
Oct. 12, 2012	Deadline for Defendants to file reply
November 19, 2012	Hearing date on Second Motion Group

IV. MOTION FOR CLASS CERTIFICATION

April 6, 2012	Deadline for Plaintiffs to designate expert witnesses in support of class certification, to provide expert report summaries and to designate fact witnesses that may be offered by Plaintiff live or via affidavit at the class certification hearing

June 1, 2012	Deadline for Defendants to designate expert witnesses in opposition to class certification, to provide expert report summaries and to designate fact witnesses that may be offered by Defendants live or via affidavit at the class certification hearing
Aug. 3, 2012	Deadline for Plaintiffs to designate rebuttal expert witnesses in support or class certification, to provide rebuttal expert report summaries and to designate rebuttal fact witnesses that may be offered by Plaintiff live or via affidavit at the class certification hearing
Aug. 3, 2012	Deadline for Plaintiffs to file Motion for Class Certification
Sept. 7, 2012	Deadline for Defendants to file responses to Plaintiff's Motion for Class Certification
Sept. 28, 2012	Deadline to complete discovery on issues of class certification
Oct. 5, 2012	Deadline for Plaintiffs to file reply on Motion for Class Certification

Oct. 26, 2012	Parties to exchange and file with the Court exhibit lists and pre-marked exhibits for class certification hearing
November 19, 2012	Hearing date for Motion for Class Certification
60 days after Class Certification Hearing Date	Deadline for parties to file proposed findings of fact and conclusions of law related to class certification

DATED this the 16th day of Sept., 2011

/s/ Kirk D. Johnson
KIRK D. JOHNSON
CIRCUIT JUDGE

APPENDIX C

IN THE CIRCUIT COURT OF MILLER COUNTY, ARKANSAS

No 2005-59-3A

JAMES BASHAM,
Individually and as Class Representatives
on Behalf of All Similarly Situated Persons,
Plaintiff,

vs.

AMERICAN NATIONAL COUNTY MUTUAL INS CO, *et al.*
Defendants.

PROTECTIVE ORDER TO PRESERVE DOCUMENTS DURING PENDENCY OF LITIGATION

This action involves claims regarding the alleged use of computer software known as "Colossus" in adjusting uninsured and underinsured motorist insurance claims. This Court believes the implementation of a preservation order is essential in complex cases because of the number of persons involved who may possess information relevant to the claims asserted in this case. It is the intent of this Court that all persons who have access to relevant or discoverable information be informed through service of a preservation order of the importance of gathering and protecting information relating to this case to avoid the inadvertent or purposeful destruction of evidence. The parties agreed to terms set forth below and this Court finds the agreed terms appropriate to assure the preservation of relevant documents.

The Court finds that it has the authority to enter this Protective Order pursuant to its inherent authority to manage the conduct of litigants before this Court and pursuant to the Arkansas Rules of Civil Procedure.

The Court finds that this Protective Order will reduce the likelihood that the parties and their officers, members,[1] employees, agents,[2] attorneys[3] or representatives[4] will destroy, discard, abscond or dispose of documents, record or information relevant to, related to or pertaining to the allegations in Plaintiffs' First Amended Class Action Complaint. The Court further finds that it is necessary that certain of the named classes of persons associated with the parties be provided with notice and a copy of this Protective

---

[1] As used in this Protective Order, "member" means member of a legal entity with persons so identified.

[2] As used in this Protective Order, "agent" means persons who currently are licensed insurance agents selling auto insurance written by a specific insurer defendant, but not including independent insurance agent who are authorized to sell insurance for more than one insurer and who are separate persons/entities not subject to the insurer's control.

[3] As used in this Protective Order, "attorney" means counsel for their parties in this action and in any underlying action relating to a UM/UIM claim brought by or against the named plaintiffs.

[4] As used in this Protective Order, except as noted below, "representative" means persons who currently act in a representative capacity on behalf of a party and who are subject to a defendant's control. "Representative" includes third-party claims adjusters who are subject to a defendant's control. "Representative" does not include non-employee outside counsel retained by defendants; provided, however, that such persons are included in the definition of "attorney" as that term is used in this Protective Order.

Order to assure compliance with the provisions of this Protective Order.

IT IS HEREBY ORDERED, that each party to this action and their officers, employees, representatives and agents shall take all steps reasonably necessary to preserve and protect any and all documents in his, her or its possession, custody or control which are relevant to, related to or pertaining to the software program known as Colossus, (b) the consideration, evaluation, testing, licensing, tuning, implementation, development, design or use of any of the software at issue, or (c) the UM or UIM insurance claims which form the basis of the name Plaintiff's claims in the Action (the "Documents to be Preserved").

IT IS FURTHER ORDERED that each party to this action and their officers, employees, representatives, agents and attorneys and anyone who would reasonably be expected to have possession or access to the documents described below are prohibited from destroying, deleting, shredding, discarding. disposing of, absconding with, hiding, or transferring possession to someone not bound by this Order, any and all Documents to be Preserved.

IT IS FURTHER ORDERED that the term "document" as used in this Protective Order means any and all materials within the scope of the Arkansas Rules of Civil Procedure Rule 34(a)(1), and, except as specifically provided below or subsequently agreed to by the parties or ordered by the Court, is intended to be all-inclusive, including, without limitation, the original or an identical copy and non-identical copies of writings, computerized data or information (excluding for documents created or revise after the date of this order routine revisions to draft electronic document that are not otherwise kept), electronically

stored information, emails, spreadsheets, software, magnetic, electronic or optical media, memoranda, directives, communication (excluding transitory impulses such as instant messages that are not otherwise kept), letters, written materials, handwritten notices, e-mail, reports, records, audits, ledgers, financial data, drawings, graphs, charts, specifications, invoices, purchase orders, receipts, personal calendars and diaries, logs, minutes, contracts, recordings of telephonic or personal communications all other records (excluding voice mail messages that are not otherwise kept), films, prints, negatives, stenographic, notes, electronic data, storage media or printouts, other data or information compilations from which information can obtained, and any written, printed, recorded or tangible matter of any character in the possession, custody or control of the parties and/or their antecedent entities, their officers, employees, attorneys, agents or any other person, company or entity under their control who would have access to or possession Documents to be Preserved as of the date of this Protective Order. "Document" shall also include any software or source code necessary to access or read any other document to be preserved pursuant to this order. "Document" shall not include original paper versions of documents imaged in archival form as called for by the Uniform Photographic Copies of Business and Public Records as Evidence Act (Ark. Code 16-46-101). This Order shall not be construed to prohibit access to, or use of, electronic documents in the ordinary course of business, including access or use which may alter one or more properties of stored information incident to such use.

IT IS FURTHER ORDERED that each of the parties shall take reasonable steps to assure that its

officers, agents, employees and representatives comply with the terms of this Protective Order.

IT IS FURTHER ORDERED that within twenty (20) days after the entry of this Protective Order, except as specified below, each party shall take the following steps to assure compliance with this Protective Order:

a. Each party shall provide a copy of this signed Protective Order to all of its officers, agents, employees and representatives who are known to have or would reasonably be expected to have possession of or access to Documents to be Preserved;

b. In providing a copy of this Protective Order to all of its officers, agents, employees and representatives who are known to have or would reasonably be expected to have possession of or access to Documents to be Preserved, parties may deliver such copies by mail, hand-delivery, interoffice delivery or email in either hard-copy form or electronic form.

c. Each party shall certify to the Court that it has provided a copy of this Protective Order to all its officers, agents, employees and representatives who are known to have or would reasonably be expected to have possession of or access to Documents to be Preserved in compliance with this Protective Order.

IT IS FURTHER ORDERED that if a party does not have the internal capability to deliver a copy of this Protective Order to its officers, agents, employees and representatives who are known to have or would reasonably be expected to have possession of or access to Documents to be Preserved in hard-copy or

electronic form, then such party shall certify to this Court under oath that it does not have such internal capability. Such certification shall be provided within twenty (20) business days after entry of this Order.

It is further ORDERED that the Chief Executive Officer, Chief Operating Officer or President, as applicable, and the Chief Counsel for each Defendant and each Plaintiff shall execute and file in this case a certificate, under oath, that: (1) a copy of this Order has been provided in compliance with the terms of this Order and (2) the method or methods of notification.

This Order pertains only to Documents to be Preserved. Any documents described, referred to, or whose production is requested in any reasonable discovery request or response made during this litigation shall, from time of the request or response, be treated for purposes of this order as Documents to be Preserved until the court rules otherwise. Counsel are directed to confer to resolve questions as to what documents are outside the scope of this order or otherwise need not be preserved and as to an earlier date for permissible destruction of particular categories of documents. If counsel are unable to agree, any party may apply to the court for clarification or relief form this order upon reasonable notice. A party failing, within thirty (30) days after receiving written notice from another party that specified documents will he destroyed, lost or otherwise altered pursuant to routine policies and programs, to indicate in writing its objection shall be deemed to have agreed to such destruction.

IT IS FURTHER ORDERED that this notice requirements of this order will not apply to the ANPAC defendants since as previous parties to this litigation

they have provided the necessary certification that the previous preservation order has been complied with by persons subject to that order.

IT IS FURTHER ORDERED that this Protective Order shall remain in effect during the pendency of this litigation or until further Order from this Court.

DATED this the 16th day of September, 2011

/s/ Kirk D. Johnson
KIRK D. JOHNSON
Circuit Judge

APPENDIX D

[LOGO]
JACKSON WALKER L.L.P.
ATTORNEYS & COUNSELORS

Stacy Allen
(512) 236-2090 (Direct Dial)
(512) 391-2102 (Direct Fax)
stacyallen@jw.com

September 26, 2011

VIA HAND DELIVERY
Hon. Kirk D. Johnson
Circuit Judge
Eighth Judicial District – South
State of Arkansas
Miller County Courthouse, Room 304
400 Laurel, 2nd Floor Courtroom
Texarkana, AR 71854

Re: Case No. 2005-59-3A; *James Basham v. American National County Mutual Ins Co, et al.*; In the Circuit Court of Miller County, Arkansas

Dear Judge Johnson:

On September 16, 2011, this Court entered a Protective Order To Preserve Documents During Pendency of Litigation (the "Preservation Order") pursuant to Plaintiff's motion in the above-referenced action. That Preservation Order was signed and entered prior to the September 26, 2011 deadline for the 21st Century Defendants[1] to respond to Plaintiff s

[1] Collectively, 21st Century Casualty Company, 21st Century Insurance Company, 21st Century Insurance Company of the Southwest and 21st Century Insurance Group.

motion pursuant to ARK. R. CIV. PROC. 6(c). Hence, the 21st Century Defendants were not afforded any opportunity to respond to Plaintiff's motion. Had the 21st Century Defendants been afforded an opportunity to respond as required by the rules, they would have opposed the motion, and in no event did they agree to entry of the Preservation Order. The Preservation Order signed by the Court, however, recites in the first paragraph that "[t]he parties agreed to terms set forth below and this Court finds the agreed terms . . . ." This recital in the Preservation Order is incorrect, and this letter is written to advise the Court that the 21st Century Defendants object to both the Plaintiff's motion and the inclusion of this language in the Preservation Order.

The 21st Century Defendants seek no affirmative relief, and submit this letter subject to and without waiving their Motion To Dismiss, including without limitation their objections to this Court's exercise of in *personam* jurisdiction over them pursuant to ARK. R. CIV. P. 12(b)(2).

Respectfully submitted,

/s/ Stacy Allen
Stacy Allen
Attorney for the 21st Century Defendants

cc: Mary Pankey, Miller County Circuit Clerk *(via hand delivery w/encl.)*

Lisa Houser, Court Coordinator *(via hand delivery w/encl.)*

All Counsel of Record *(via e-mail w/encl.)*

APPENDIX E

[Logo] NIX PATTERSON & ROACH, LLP

Christopher R. Johnson
Licensed in Louisiana & Texas

October 25, 2011

VIA EMAIL ONLY

Philip E. Kaplan- Infinity
Joann C. Maxey
Williams & Anderson PLC
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Swartz Campbell LLC
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Philadelphia, PA 19102

Dan F. Bufford- Erie
Laser Law Firm
101 S. Spring Street, Suite 300
Little Rock, AR 72201

RE: *James Basham, et al v. Computer Sciences Corporation, et al*
Miller County Circuit No. CV-2005-59-3A
Third Division

Dear Counsel,

As you are each aware, the Court issued its Protective Order to Preserve Documents During Pendency of Litigation on September 16, 2011. In that Order, the Court set forth certain conditions which had to be met in order to be considered in compliance therewith. Plaintiff believes your clients did not comply with the terms of the Order.

Unless your client comes into full compliance with the terms of the Order by November 3, 2011, Plaintiff will commence motion practice seeking enforcement of the Court's Order.

Sincerely yours,

/s/ Christopher R. Johnson
Christopher R. Johnson
cjohnson@nprаustin

APPENDIX F

IN THE CIRCUIT COURT OF
MILLER COUNTY, ARKANSAS

No.: 2011-0623-3

EDDIE BASHAM, AS ADMINISTRATOR OF THE ESTATE OF JAMES BASHAM, AND FREDA MCCLENDON, INDIVIDUALLY AND AS CLASS REPRESENTATIVES ON BEHALF OF ALL SIMILARLY SITUATED Persons,
Plaintiffs,

vs.

AMERICAN NATIONAL COUNTY MUTUAL INS CO, *et al*
Defendants

PLAINTIFFS' FIRST MASTER SET OF INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS AND REQUEST FOR INSPECTION ON DEFENDANT INSURANCE COMPANIES

Plaintiffs, pursuant to Arkansas Rules of Civil Procedure 26, 26.1 and 33 submit the following Interrogatories to Defendants, thereby requiring that they be answered separately, in writing, under oath on or before the next business day following the expiration of thirty (30) days after the receipt of these Interrogatories.

Plaintiffs, pursuant to Arkansas Rules of Civil Procedure 26, 26.1 and 34, submit the following Requests for Production to the Defendants, thereby requiring each Defendant to produce electronic copies of all DOCUMENTS designated herein in the manner

set forth in Appendix A, Plaintiffs' Production Format Requirements, at the office of NIX PATTERSON & ROACH, L.L.P., 3600 North Capital of Texas Highway, Building B, Suite 350, Austin, TX 78746, attorneys for Plaintiffs, on or before the next business day following the expiration of thirty (30) days after the receipt of this request.

* * * *

[32]Arkansas Rule of Civil Procedure 23(a) is not satisfied in this matter, please state all YOUR factual and legal bases for this contention.

INTERROGATORY NO. 123: If YOU contend that the class representative(s) in this matter is/are not an adequate class representative(s) under Arkansas Rule of Civil Procedure 23(a), please state all YOUR factual and legal bases for this contention

INTERROGATORY NO. 124: If YOU contend that counsel representing plaintiff(s) in this matter are not adequate under Arkansas Rule of Civil Procedure 23(a), please state all YOUR factual and legal bases for this contention.

INTERROGATORY NO. 125: If YOU contend that the claims of the plaintiff(s) in this matter do not satisfy the commonality requirement of Arkansas Rule of Civil Procedure 23(a), please state all YOUR factual and legal bases for this contention.

INTERROGATORY NO. 126: If YOU contend that the claims of the plaintiff(s) in this matter do not satisfy the typicality requirement of Arkansas Rule of Civil Procedure 23(a), please state all YOUR factual and legal bases for this contention.

INTERROGATORY NO. 127: If YOU contend there is any other reason not covered by YOUR responses

to Interrogatories Nos. 122 - 126 above that this matter should not be certified as a class action under Arkansas Rule of Civil Procedure 23, please state all YOUR factual and legal bases for this contention.

INTERROGATORY NO. 128: State whether YOU believe a file-by-file review of each claim upon which COLOSSUS was utilized is necessary to calculate underpayments (assuming for purposes of this Interrogatory that underpayments do exist) on a class-wide basis.

INTERROGATORY NO. 129: State whether YOU believe it is possible to calculate class-wide underpayments (assuming for purposes of this Interrogatory that underpayments do exist) related to the use of COLOSSUS through statistical analysis.

INTERROGATORY NO. 130: State, describe and explain YOUR opinion as to how a statistically representative sample of class members could be obtained.

INTERROGATORY NO. 131: State, describe and explain YOUR belief as to what number of class members would constitute a statistically significant sample.

REQUESTS FOR PRODUCTION:

REQUEST NO. 1: Each DOCUMENT identified in YOUR response/answer to any Interrogatory above or Request for Admission served contemporaneously herewith.

REQUEST NO. 2: Each DOCUMENT relied upon, referred to or consulted by YOU in responding to or answering any Interrogatory above or Request for Admission served contemporaneously herewith.

REQUEST NO. 3: Each DOCUMENT, photograph, video clip, or other tangible item YOU anticipate using as an exhibit or demonstrative aid at a deposition, certification hearing or trial.

REQUEST NO. 4: Each DOCUMENT showing or indicating when YOU first became aware of the *Hensley v. CSC* lawsuit, Miller County Circuit Court, No. 2005-59-3.

REQUEST NO. 5: Each DOCUMENT showing or indicating when YOU first became aware of any class action that challenged the use of Colossus on UM/UIM claims.

REQUEST NO. 6: Each DOCUMENT which relates to the *Hensley* litigation obtained or created by YOU before service upon YOU of the instant suit.

REQUEST FOR INSPECTION AND ENTRY UPON LAND

REQUEST: To inspect and examine any facilities, computer systems and electronic content on any company owned or operated system, computing resource, or other electronic device and/or files and the information contained therein as it pertains to COLOSSUS production, test and development environments as well as peripheral applications, systems and files that are used to administer, tune, maintain, test, report and measure/analyze the system and results.

Respectfully submitted,

/s/ John C. Goodson
JOHN C. GOODSON
Arkansas Bar Number 90018
MATT KEIL
Arkansas Bar Number 86099

KEIL & GOODSON
406 Walnut Street
Texarkana, Arkansas 71854
Telephone: 870.772.4113
Facsimile: 870.773.2967

NIX, PATTERSON & ROACH, LLP
3600 N. Capitol of Texas Highway
Bldg. B, Suite 350
Austin TX 78746
Telephone: 512.328.5333
Facsimile: 512.328.5335

BRAD E. SEIDEL
Arkansas Bar No. 2007122

Attorneys for Plaintiffs

APPENDIX A

Production Format Requirements

1. Overview

This Overview section defines key terms and summarizes key points regarding document productions All requirements are elaborated in detail in subsequent sections.

a. Definitions

For purpose of these Production Format Requirements and document requests propounded by Plaintiff(s), the following terms shall have the meanings ascribed to them below.

"**Document**" is defined to be synonymous in meaning and equal in scope to the usage of this term in Arkansas Rules of Civil Procedure 26, 26.1(a)(1)-(3) and Rule 34 and shall include every writing or record of every type and description in any form whatsoever and all other tangible objects. This definition in intended to compliment, not supplant, any definition of "document" contained in any discovery request submitted by Plaintiff(s). The term Document includes writings, drawings, graphs, charts, photographs, video and sound recordings, images, and other data or data compilations (electronic or otherwise) from which information can be obtained either directly or, if necessary, after translation by the producing party into a reasonably usable form. The term Document also includes electronically stored information ("ESI") and transmission of ESI through Electronic Media. For illustrative purposes, examples of documents include each of the following: memorandum, file, communication, correspondence, study, report, working paper, record, recording, minutes,

instruction, literature, notes, notebook, diary, calendar, data sheet, work sheet, summary, tabulation, calculation, index, picture, graphic matter, agreement, contract, arrangement, understanding, invoice, bill, web page, software, and algorithm. A draft or non-identical copy or version is a separate document within the meaning of this term. A document shall be produced with any and all of the document's associated metadata.

"**Electronic Media**" means any magnetic, flash or other storage medium or media device used to record and/or store ESI. Electronic Media includes, but is not limited to, portable media, hard disks, floppy disks, hard drives, jump drives, thumb drives, memory sticks, flash media, CDs. DVDs, zip drives, personal digital assistance devices and handheld storage devices (e.g., Palm, Blackberry, iPhone or other "smart phones"), magnetic tapes of all types, intranet and Internet repositories of all types including web-sites, cloud or web storage, software code repositories (including code vaults or other source code storage systems), and any other vehicle for digital data storage, back-up and/or transmittal. Electronic media also includes, without limitation, memory and information storage systems associated with servers, computers, handheld storage devices, iPads, tablet computers, email systems (including those hosted by ISPs), voicemail systems, instant messaging systems, social networking systems, and fax servers.

"**Electronically Stored Information**" or "ESI" is defined to be synonymous in meaning and equal in scope to the usage of this term in Arkansas Rule of Civil Procedure 26,1 (a)(3) and includes any information that is stored electronically, regardless of the

media or whether it is in the original format in which it was created. ESI includes, but is not limited to, any original and non-identical copies (including non-identical copies with attached comments, annotations, marks, transmission notations, or highlighting of any kind) programs (whether private, commercial or work-in-progress), programming notes or instructions, activity listings of electronic mail receipts or transmittals, output resulting from the use of any software program (including word processing documents, spreadsheets, worksheets, database files, charts, graphs, outlines, PDF files, PRF files, PST files, batch files, and ASCII files), electronic mail, operating systems, source code of all types, programming languages, logs, file layouts, web pages, HLML code, digital photographs, audio files, video files, calendars, contacts, GPS data, and RFID data, regardless of the Electronic Media on which they reside and, if reasonably accessible as contemplated by Arkansas Rules of Civil Procedure 26, 26.1 and 34 regardless of whether said ESI consists of an active file, legacy system file, backup file, archived file, deleted file or file fragment. ESI also includes, without limitation, any items stored on Electronic Media in tiles, folder tabs, or containers, and labels appended to or associated with any physical storage device associated with each original and each copy.

A "**native file**" is in the format in which ESI was originally created (e.g., Microsoft Word, Microsoft Excel, Microsoft Access, PeopleSoft, Outlook) and as it is kept in the ordinary course of business.

An "**image file**" is a file that has been created by scanning a document or electronically rendering an image of a native file. As set forth below, the format

must be TIFF for black and white images and must be either TIFF or JPG for color images.

A "**text file**" is a searchable file that is created by either (1) extracting text from the related native file (preferred), or by (2) OCR processing the related image file.[1] As set forth below, the format must be .txt.

Document "**metadata**"[2] is electronically stored data that describes characteristics of a document, such as how, when, and by whom a document was collected, created, accessed, modified, and how it is formatted. Metadata can be supplied by a variety of sources, such as applications, users, and file systems. As set forth below, the metadata must be included in the data load file.

The "**load files**" contain (1) information required to properly associate related native files, image files, text files and metadata, and (2) instructions to correctly load the files and metadata into the selected computer based review system.

b. Productions

Each responsive document produced in this litigation shall be produced as follows:

(a) as a native file[3];

(b) with a corresponding image file;

(c) with a corresponding text file;

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[1] As such, text files are commonly referred to as "extracted text tiles" or "OCR files".

[2] Some of the metadata required by this specification must be manually coded (e g., custodian, source location).

[3] Native files will typically not be produced for scanned documents.

(d) with all required metadata; and

(e) with well-formed image and data load files.

E-mail shall be produced in a manner that preserves the relationship between each e-mail and all of its attachments information from each e-mail header field trust be produced in the metadata Attachments to e-mail must be produced in the electronic form in which they ordinarily are maintained in an image file with the corresponding image load file, and the associated metadata.

In all document productions, you must provide all available information about unitization (including the production number of the first and last page of each document), internal linkages, information about attachments (including information sufficient to identify the parent and child relationships of al; documents and ESI that are or have attachments including E-mails), and information about hyperlinked fields.

Detailed requirements governing the format of productions are provided below.

2. Applicable Data Sources

The scope of your search for responsive documents (including ESI) shall include various sources of data including, but not limited the following sources and Electronic Media relating thereto:

i. **Computer systems**, *i.e.*, mainframe computers, local (stand-alone) computers, networked computers, laptop computers, home computers, tablet computers, iPads. PDAs, and other computer and handheld devices;

ii. **Distributed data or removable media**, i.e., information which resides on portable

media and non-local devices, including hard disks, floppy discs, hard drives, jump drives, thumb drives, memory sticks, flash media, CDs, DVDs, zip drives, magnetic tapes of all types, and Internet repositories of all types including websites, cloud and web storage;

iii. **Network systems**, including voice mail systems and servers, email systems and servers (including those hosted by Internet Service Providers (ISPs)), Instant Messaging (IM) systems and servers, social networking systems and servers, ISP servers, network servers, and fax servers;

iv. **Software source code repositories**, including code vaults or other source code storage systems;

Where reasonably accessible as contemplated by Arkansas Rules of Civil Procedure 26, 26.1, and 34, the scope of your search for responsive documents, including ESI, shall include the following sources of data:

v. **Legacy data**, *i.e.*, retained data that has been created or stored by the use of software or hardware that has been rendered outmoded or obsolete;

vi. **Forensic copy or backup data**, including archive and backup data tapes and disks; and

vii. **Residual or deleted data**, *i.e.*, data that is not active on a computer system, including data found on media slack space, tile fragments, data found on media slack space and

data within files that have been functionally deleted.

3. Protocols for AU Submissions

The protocols in this section apply to ALL documents, including ESI, produced in this action. Additional requirements pertaining to metadata, format, etc., for certain types of documents appear in Section 4 below.

a. Load Files

With each production you must submit load files as follows:

i. A data load file that conforms to the following requirements:

- UTF-8 encoded;
- Contains a separate record, on a separate line, for every document in the production;
- Includes a file path to the associated text and native files for each document;
- Includes all required metadata for each document;
- Contains a field header with the delimited metadata field names in the order in which they appear in each record in the load file;
- Uses the following delimiters:

Description	Symbol	ASCII Character
Field Separator	□	020
Quote Character	Þ	254
New Line	®	174

- Does not include escape characters, tabs, carriage return/line feed combinations, embedded separators, or embedded carriage returns in any delimited metadata fields; and
- Terminates each record, including the last record, with a carriage return or carriage return/line feed pair.

ii. An **image load file** that conforms to the following requirements:

- Is Opticon (OPT) formatted;
- Is UTF-8 encoded;
- Production Numbers in the OPT load file must match the corresponding documents' beginning bates numbers in the data load file;
- Contains a separate record, on a separate line, for every image file in the production;
- Does not include escape characters, tabs, carriage return/line feed combinations, embedded separators, or embedded carriage returns in any comma delimited fields, and
- Terminates each record, including the last record, with a carriage return or carriage return/line feed pair.

b. Text Files

Searchable text files shall be submitted for every document produced. Wherever possible, the text file should be created by extracting text from the related native file. If this is not possible (e.g., in the case of

redacted documents and certain image files), the text file must be created by OCR processing the related image file. OCR processed text files must be readable and accurately represent the text in the image files.

OCR PROCESSED DOCUMENTS THAT ARE NOT EASILY READABLE, OR DO NOT ACCURATELY REPRESENT THE TEXT IN THE RELATED IMAGE FILES, WILL BE RETURNED FOR ADDITIONAL PROCESSING BY THE PRODUCING PARTY.

All text files must meet the following additional requirements:

i. Document-level .txt files (not one file per page);

ii. Named for the beginning bates number;

iii Formatted with UTF-8 encoding;

iv, Lines and breaks in the original image document should be preserved and lines should be separated by line feeds; and

v. Do not include escape characters, tabs, embedded separators or embedded carriage returns.

c. Image Files

All image files must meet the following requirements:

i. Image resolution of 300 DPI;

ii. Named for the beginning bates number;

iii. Single-page Group IV TIFF files. This is the required format for black and white images;

iv. Single-page JPG files. This is the preferred format for color images. JPG files will not be accepted for black and white images;

v. Bates numbers shall be branded to the images so that the numbers print; and

vi. Each image shall have branded on it any applicable confidentiality language pursuant to the parties' protective order.

d. Labelling & Numbering Files

Image file names and Bates numbers must meet the following requirements:

i. Have a consistent format including a consistent number of characters.

ii. Have the same number of numerals to prevent issues with image display, Use leading zeros where necessary to achieve this.

iii. Not use a space or special characters to separate the prefix from numbers.

Examples of acceptable formats (as long as they are consistently applied):

i. ABC0001, DEF2987; and

ii. ABC-0001, DEF-2987.

Example of unacceptable formats:

i. ABC I, DEF2987; inconsistent number of numerals; and

ii. ABC 0001, DEF 2987; space between prefix and number.

e. Date & Time Formats

For any specific date and/or time data:

i. Submit date and time data in separate fields.

ii. Dates should be submitted in the forma: MM/DD/YYYY (e.g., January 12, 201 I would be 01/12/2011).

iii. Times should be submitted in the 24-hour format HH:MM:SS (e.g., 6:30 pm would be I 8:30:00).

iv. Time offsets should be submitted in 24-hour format from Greenwich Mean Time (GMT) (e.g., GMT-05:00:00).

f. Virus Scanning

All electronic documents and production media shall be scanned and free of viruses prior to shipping.

g. Unlocking & De-crypting

In cases where electronic data has been encrypted, locked or otherwise protected, the producing party shall, whenever possible, de-crypt or unlock such files or data to allow full access to the data by third parties. In addition to producing in native or original form, to the extent the producing party has specialized or custom software that will allow ESI to be translated into usable form, such translated data should be produced as well. Any exceptions shall be included in the exception files as detailed below.

h. Exception Files

Any responsive documents or ESI that cannot be produced as specified in this document shall be identified in a separate exception log in Excel format that allows test searching and organization of data. This log File will include the following information for each exception:

i. The file name;

ii. The file type;

iii. The custodian, and

iv. The reason for the exception

Potential causes of exceptions include, without limitation, eorruption, password protection, other forms of encryption, digital rights management, or access that requires use of proprietary software associated with the file.

Any exceptions that are encountered during the processing of an individual file, but do not prevent the file from being processed, must be captured in the Processing Exceptions metadata field related to the file.

i. Withheld Documents & Privilege Logs

If any document is withheld, in whole or in part, for any reason, including, but not limited to, any claim of privilege, whether work-product or attorney-client, confidentiality or trade secret, the Producing Party shall provide a privilege log setting forth separately with respect to each such document:

i, The nature of the privilege or ground of confidentiality claimed;

ii. The type of document;

iii. The authors of the document;

iv. The addressees of the document;

v. All persons who received copies of the document;

vi, The date of the document;

vii. The general subject matter of the document;

viii. The Bates and/or control number(s) assigned to the document; and

ix. Any other information required by the Arkansas Rules of Civil Procedure or Local Rules of the Court.

The privilege log shall be provided in Excel format that allows text searching and organization of data. A separate privilege log relating to each production shall be provided.

j. Documents Containing Privileged and Non-Privileged Material

If a document contains both privileged and non-privileged material, the non-privileged material must be disclosed to the fullest extent possible without thereby disclosing the privileged material. If a privilege is asserted with regard to part of the material contained in a document, the Producing Party must clearly indicate the portions as to which the privilege is claimed and provide the information required by Section 3(i) above.

4. Preparing Collections – Document Specific Requirements

This section includes additional format and metadata requirements pertaining to scanned documents, native files, email, and email attachments.

a. Preparing Scanned (Imaged) Documents

Required Format for Scanned Images

i. Submit image files with associated text files and the metadata identified in Schedule 1 attached hereto.

Required Metadata for Scanned Images

i. Include the metadata fields identified in Schedule I attached hereto in the delimited data load tile.

ii. All metadata field names must be named consistently and in accordance with the value in the "Field Name" column in Schedule I attached hereto*

b. Preparing Native Files (other than email)
Required Format for Native Files

i. Submit Microsoft Access files, other database files, and other multimedia files in native format with associated image files and metadata as detailed in Schedule I attached hereto. *Do not provide extracted text for these file types.*

ii. Submit *all other files*, including Microsoft PowerPoint and Excel files, in native format, with associated image files, text files and the metadata identified in Schedule I attached hereto.

iii. Whenever possible, text files must be extracted from native files. If this is not possible, the text file must be created by OCR processing of the associated image file.

Required Metadata for Native Files

i. Include the metadata fields identified in Schedule I attached hereto in the delimited data load file.

ii. All metadata field names must be named consistently and in accordance with the value in the "Field Name" column in Schedule I attached hereto.

c. Preparing Email & Attachments

Required Format for Email & Attachments

Email

i. For each email, submit a MSG file, image file, text file and the metadata identified in Schedule I attached hereto.

Attachments

i. Submit Microsoft Access files, other database files, and other multimedia files in native format with associated image files and metadata as detailed in Schedule I attached hereto. *Do not provide extracted text for these file types.*

ii. Submit *all other files* including Microsoft PowerPoint arid Excel riles, in native format, with Associated Files, text riles and the metadata identified in Schedule I attached hereto.

iii. Whenever possible, text files must be extracted from native files. If this is not possible, the text file must be created by OCR processing of the associated image file.

Metadata Details for Email & Attachments

i. Preserve the parent/child relationship in email by including a reference to all attachments.

ii. Produce attachments as separate documents and number them consecutively to the parent email.

iii. Include the metadata fields identified in Schedule I attached hereto in the delimited data load file.

iv. All metadata field names must be named consistently and in accordance with the value in the "Field Name" column in Schedule I attached hereto.

5. Submitting Your Production

Once you have prepared documents according to this guide, please follow the instructions below to submit the production to the other party(ies).

a. Acceptable Media

Submit any of the following:

i. For productions under 10 gigabytes:

- CD-R or CD-ROM optical disks formatted to ISO 9660 specifications;
- DVD-ROM optical disks for Windows-compatible personal computers;
- DVD DL optical disks for Windows-compatible personal computers; or
- USB 2.0 flash drives.

ii. For productions over 10 gigabytes:

- IDE, EIDE and SATA hard disk drives, formatted in Windows-compatible, uncompressed data in a USB 2.0 external enclosure; or
- USB 2.0 flash drives.

b. Production Transmittal Letter

For each production, the submission must be accompanied by a letter that includes all of the following:

i. Case name (use the same case name for all productions in the case);

ii. Party name (use the same defendant name for all productions from a given party);

iii. Production number (number the productions sequentially, in order of production date);

iv. Production date (date that the production was created by the party);

v. Bates ranges of production;

vi. Custodians from whom production originated;

vii. Total number of records;

viii. Total number of images, text and native files;

ix. Report identifying native files in the production by file type;

x. List of fields in the order in which they are listed in the data files; and

xi. Confirmation that the number of files on the volume matches the load Files.

6. Quality Control & Improvement

Each production will be validated for conformance to the requirements in this document. Any issues shall be identified to the Producing Party. Both parties shall work together in good faith to expedite resolution of any such issues, and implement any

changes necessary to reduce issues on future productions.

7. Sources Relied Upon in Preparing Requirements

a. Bureau of Competition Production Guide - An eDiscovery Resource (2010), http://www.ftc.gov/bc/guidance/bcproductionguide.pdf.

b. *Nat'l Day Laborer Organizing Network, et al., v. United States Immigration and Customs Enforcement Agency, et al.*, 10-cv-3488 (S.D.N.Y. filed Feb. 3, 2011), available at http://www.courthousenews.com/2011/02/04/DayLaborer.pdf.

c. Plaintiff's Production Format Requirements - Comments; (Studeo Legal, May 31, 2011).

d. EDRM Production Form (Electronic Discovery Reference Model (2011), http://edrm.net/wiki2/images/EDRM Production Form.pdf.

e. The Sedona Conference Glossary, E-Discovery & Digital Information Management, The Sedona Conference (3rd Ed., Sept. 2010).

Required for:	
Emails	Attachments
X	X
X	X
X	X
X	X
X	X
X	X
X	X
X	X
X	X
X	X
X	X
-	X
X	X
-	X

ow such metadata will be
picture was taken).

Appendix A: Production Format Requirements

Schedule 1: Metadata Requirements for Scanned Images, Native Files, Emails, and Attachments[6]

Row No.	Metadata	Description	Field Name	Metadata Required for:			
				Scanned Images	Native Files	Emails	Attachments
1	Beginning Bates Number	Beginning bates number for the document	BegDoc	X	X	X	X
2	Ending Bates Number	Ending bates number for the document	EndDoc	X	X	X	X
3	Beginning Attachment	Beginning bates number of the first document in the family group	BegAttach	X	X	X	X
4	Ending Attachment	Ending bates number of the last attachment in the family group	EndAttach	X	X	X	X
5	Case Name	Same name to be used on all productions within the case	CaseName	X	X	X	X
6	Party Name	Same name to be used on all productions from the producing party	PartyName	X	X	X	X
7	Production Number	Productions to be numbered sequentially, in chronological order	ProductionNumber	X	X	X	X
8	Production Date	Date the production was created by the producing party	ProductionDate	X	X	X	X
9	Confidentiality Designation	Confidentiality designation assigned to the document	ConfDesignation	X	X	X	X
10	Custodian	Name of person who had custody of the document at point of collection	Custodian	X	X	X	X
11	File Name	Name of the native file or attachment	FileName	-	X	-	X
12	Document Extension	Extension type of the document (e.g., xls, doc, mmap, msg)	DocExt	-	X	X	X
13	File Size	Size of the document in bytes	FileSize	-	X	-	X

[6] Where metadata other than that listed in this Schedule 1 exists for any document, the parties shall meet and confer about whether and how such metadata will be produced (e.g., metadata revealing geographic location where a digital picture was taken or the name/type of the device from which the picture was taken).

Appendix A: Production Format Requirements

14	Document Title	Title field from the document metadata	Title	-	X	-	X
15	Author	Author field from the document metadata	Author	-	X	-	X
16	Document Subject	Subject field from the document metadata	Subject	-	X	-	X
17	Company	Company field from the document metadata	Company	-	X		X
18	Category	Category field from the document metadata	Category	-	X	-	X
19	Keywords	Keywords field from the document metadata	Keywords		X	-	X
20	Comments	Comments field from the document metadata	Comments	-	X	-	X
21	Date Created	Date from the document metadata (Created field)	DocDate	-	X	-	X
22	Time Created	Time from the document metadata (Created field)	TimeCreated	-	X	-	X
23	Date Modified	Date from the document metadata (Modified Date field)	DateModified	-	X	-	X
24	Time Modified	Time from the document metadata (Modified Date field)	TimeModified	-	X	-	X
25	Date Last Accessed	Date from the document metadata (Last Access Date property)	DateLastAccessed	-	X	-	X
26	Time Last Accessed	Time from the document metadata (Last Access Date property)	TimeLastAccessed	-	X	-	X
27	Date Printed	Date the file was last printed from the document metadata (Printed field)	DatePrinted	-	X	-	X
28	Time Printed	Time the file was last printed from the document metadata (Printed field)	TimePrinted	-	X	-	X
29	Time Offset	Time offset of the source system relative to Greenwich Mean Time	TimeOffset	-	X	X	X
30	Embedded Data	Message indicating that tracked changes, hidden fields, or data are present	EmbeddedData	-	X	-	X
31	Hash Value	Unique identifier created for electronic file	HashValue	-	X	X	X
32	Parent Document ID	Beginning Bates number of parent for child items in family group	ParentID	-	-	-	X
33	Has Attachments	Indicates if email has attachments	HasAttachments	-	-	X	-

Appendix A: Production Format Requirements

34	Number of Attachments	Number of attachments for a particular record	AttachmentCount	-	-	X	-
35	Attachment IDs	Beginning Bates of all child items in family group	Attachment	-	-	X	-
36	Attachment Name(s)	Lists the file name(s) of each attachment	AttachmentNames	-	-	X	-
37	From	Author of the email message	From	-	-	X	-
38	To	Recipient(s) of the email	To	-	-	X	-
39	CC	Person(s) copied on the email	CC	-	-	X	-
40	BCC	Person(s) blind copied on the email	BCC	-	-	X	-
41	Email Subject	Subject of the email	EmailSubject	-	-	X	-
42	Date Received	Date the email was received	DateReceived	-	-	X	-
43	Time Received	Time the email was received	TimeReceived	-	-	X	-
44	Date Sent	Date the email was sent	DateSent	-	-	X	-
45	Time Sent	Time the email was sent	TimeSent	-	-	X	-
46	Email Header	Contents of the email message header	Header	-	-	X	-
47	Message ID	Unique identifier of emails in mail stores	MessageID	-	-	X	-
48	Email Conversation	Normalized subject of e-mails (RE and FW are removed)	EmailConversation	-	-	X	-
49	Email Conversation Index	E-mail thread created by the email system	ConversationIndex	-	-	X	-
50	Importance Flag	Importance field extracted from the email	ImportaceFlag	-	-	X	-
51	Read Flag	Read status of an email	ReadFlag	-	-	X	-
52	Message Class	Determines the form that the email system (e.g., Outlook) uses to display the item	MessageClass	-	-	X	-
53	Flag Status	Status of any flags associated with the email	FlagStatus	-	-	X	-
54	Delivery Receipt	Indicates if the email author turned on delivery receipt request notification	DeliveryReceipt	-	-	X	-
55	Read Receipt	Read receipt request notification	ReadReceipt	-		X	-

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Appendix A: Production Format Requirements

56	Source Media Type	Type of media used to store the document at point of collection (e.g., hard drive, thumb drive, cloud storage, paper (hard copy))	SourceMediaType	X	X	X	X
57	Source Media Location	For scanned images, physical location of source document at point of collection (e.g., identification of file cabinet and file folder) For ESI, location of source Electronic Media at point of collection (e.g., remote server, home office server, iphone)	SourceMediaLoc	X	X	X	X
58	Source Folder Path	Path to document or email within source electronic media or source mail file structure	SourceFolderPath	-	X	X	X
59	Native File Path	Path to native file within production electronic media	NativeFilePath	-	X	X	X
60	Text File Path	Path to the text file within the production electronic media	TextFilePath	X	X	X	X
61	Page Count	Total number of pages in document. If scanned image, number of pages of image. If native file, number of pages of native file.	PageCount	X	X	X	X
62	Processing Exceptions	Exceptions for document with issues related to processing or extraction	Exceptions	X	X	X	X
63	Redacted	Indicates if document contains redacted information (yes/no)	Redacted	X	X	X	X
64	Privileged	When privileged document has been replaced by slip sheet, indicates that document has been withheld on basis of privilege (yes/no)	Privileged	X	X	X	X

APPENDIX G

IN THE CIRCUIT COURT OF MILLER COUNTY, ARKANSAS

NO.: CV-2004-294-3

EVELYN J. CHIVERS, HAVEN and LINDA TYSON, MARY LYNN FREEMAN, JAMES JOINER, DANIEL JOE SHERROUSE, BILL FEELY, DALE DROSTE, JARL CARTWRIGHT, BRAD SCHOONOVER, JOHN and GLORIA LANG, PHILLIP and CYNDI ALEXANDER, BERNE FRANCIS, and DIANE THORNTON, Individually and as Class Representatives on Behalf of All Similarly Situated Persons,

Plaintiffs,

vs.

STATE FARM FIRE & CASUALTY COMPANY, *et al.*,

Defendants.

ORDER

ON THIS DAY, the Court considered Plaintiffs' Motion to Defer Consideration of Defendants' Motions to Dismiss and Other Substantive or Procedural Motions Pending Entry of Scheduling Order.

After reviewing the pleadings, arguments of counsel, and other matters before the Court, the Court finds that Plaintiffs' Motion to Defer Consideration of Defendants' Motions to Dismiss and Other Substantive or Procedural Motions Pending Entry of Scheduling Order should be GRANTED.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that all responses, replies and other briefing deadlines related to all Defendants' motions to dismiss and other substantive or procedural motions are hereby suspended until such time as the Court holds a scheduling conference and enters a comprehensive scheduling order that will address briefing deadlines for all motions and issues.

DATED this 15th day of November, 2004.

KIRK D. JOHNSON
HONORABLE KIRK D. JOHNSON
Miller County Circuit Judge

APPENDIX H

IN THE CIRCUIT COURT OF MILLER COUNTY, ARKANSAS CIVIL DIVISION

DOCKET NO. CV-2004-294-3

EVELYN CHIVERS, HAVEN and LINDA TYSON, MARY LYNN FREEMAN, JAMES JOINER, DANIEL JOE SHERROUSE, BILL FEELY, DALE DROSTE, JARL CARTWRIGHT, BRAD SCHOONOVER, JOHN and GLORIA LANG, PHILLIP and CYNDI ALEXANDER, BERNE FRANCIS, and DIANNE THORNTON, Individually and as Class Representatives on Behalf of All Similarly Situated Persons,

Plaintiffs,

VS.

STATE FARM FIRE & CASUALTY COMPANY, *et al.*,

Defendants.

AMENDED SCHEDULING ORDER

It is hereby Ordered that the following schedule of deadlines are in effect until further order of this Court since the parties were unable to agree to an agreed scheduling order. This schedule will be strictly adhered to by all parties. Parties may present a Scheduling Order that amends this order by agreement if it does not interfere with the Court's scheduled hearing dates. The Court will not deviate from this order without good cause shown except by agreement of the parties.

February 25, 2005;	Hearing on Motions of *Forum Non Conveniens*;
April 11, 2005;	Deadline for completion of jurisdictional or venue discovery for Defendants who have filed Rule 12(b)(2) and Rule 12(b)(3) pleadings;
April 12, 2005;	Deadline for Plaintiffs to file Responses to Defendants' Motions to Dismiss pursuant to Rule 12(b)(2) and Rule 12 (b)(3);
April 22, 2005;	Deadline to file Responses to Plaintiffs' Responses to Defendants' Motions to Dismiss pursuant to Rule 12(b)(2) and/or Rule 12 (b)(3);
May 2, 2005;	Hearing on Defendants' Motions to Dismiss pursuant to Rule 12(b)(2) and Rule 12 (b)(3);
May 20, 2005;	Deadline to add additional parties;
June 1, 2005;	Deadline for Plaintiffs to designate expert witnesses for Class Certification hearing;
June 10, 2005;	Deadline for Defendants to designate expert witness for Class Certification hearing;
June 20, 2005;	Deadline for Plaintiffs to designate Rebuttal experts to Defendants' expert witnesses for Class Certification hearing;

June 25, 2005;	Deadline for Plaintiffs to file Amended Class Action Complaint without leave of Court;
June 30, 2005;	Deadline for Plaintiffs to file Motion for Class Certification;
July 5, 2005;	Deadline for Defendants to file any supplemental or amended Motion to Dismiss pursuant to Rule 8(a) and Rule 9(b);
July 6, 2005;	Deadline to complete discovery on issue of class certification;
July 10, 2005;	Deadline for Defendants to file Responses to Plaintiffs' Motion for Class Certification;
July 15, 2005;	Deadline for Plaintiff to file Response to any supplemental or amended Rule 8(a) or Rule 9(b) Motions;
July 20, 2005;	Deadline for Plaintiffs to File Replies to Defendants' Responses to Plaintiffs' Motion for Class Certification;
July 25, 2005;	Deadline for Defendants to file Replies to Plaintiffs' Response to Defendants' Motions to Dismiss under Rule 8(a) and Rule 9(b);
July 26, 2005;	Plaintiffs to make all of their witness available for deposition prior to this date;

August 1, 2005:	Defendants to make all of their witnesses available for deposition prior to this date.
August 12, 2005:	Parties to exchange exhibit lists and pre-marked exhibits for class certification hearing and Rule 8(a) and Rule 9(b) hearings.
August 22, 2005:	Hearing date for Motions to Dismiss under Rule 8(a) and Rule 9(b);
August 23, 2005:	Hearing date for Motion for Class Certification;
September 5, 2005:	Deadline for parties to file proposed findings of fact and conclusions of law;
September 9, 2005:	Plaintiffs to designate Expert Trial Witnesses and provide Defendants with copies of Experts Reports.
October 10, 2005:	Defendants to designate Expert Trial Witnesses and provide Plaintiffs with copies Expert's Reports and Deadline for Motions for Summary Judgment;
November 1, 2005:	Deadline for Motions for unresolved Discovery issues and Plaintiffs to file Response to Defendants' Motions for Summary Judgment;
January 5, 2006:	Deadline for Plaintiffs to amend pleadings and to identify trial witnesses;

January 25, 2006;	Deadline for Defendants to file Response to amended pleadings and to identify trial witnesses;
February 1, 2006;	Discovery deadline;
February 15, 2006;	Deadline for parties to file Motions in Limine and to Exchange Pre-marked Trial Exhibits;
March 20, 2006;	Final Pre-trial Conference
March 30, 2006;	Trial Date

The Court has extended some scheduling dates beyond the dates of the scheduled hearings in August. The Court, in extending the scheduling order beyond the August hearing dates, wants to give the parties adequate notice of important deadlines should the class be certified and the litigation continues. The Court wants counsel to have reserved the scheduled trial date on their calendars to avoid any potential conflicts. The Court fully expects amendments to the scheduling order after the class certification and other hearings are completed in August should this be necessary to more appropriately address discovery issues.

The Court finds that class and merits discovery should proceed forthwith. The Court is aware that this finding could result in short term expenses being greater for some Defendants. However, in the long run, the Court is convinced that proceeding with merit discovery in conjunction with class discovery will ultimately be more convenient and less expensive to all parties remaining in the litigation. The Court believes that it will save duplication of effort in the scheduling of the witnesses, travel expenses,

reporter expenses and will reduce the difficulties in coordinating the schedules of counsel for the multiple parties.

The Court finds that Defendants may have legitimate concerns over proprietary information and trade secrets that might be required to be disclosed during the discovery process. The Plaintiffs shall attempt to reach agreement with the individual Defendants for the entry of a Protective Order to maintain the confidentiality of trade secrets of that Defendant which might be disclosed to other Defendants, competitors or the public during the discovery process. The Court will enter such Protective Orders that are deemed fair, proper and necessary to protect the confidentiality of trade secrets or proprietary information of any Defendant. If the parties cannot agree on documents that should be given this status, a privilege log may be prepared and submitted to the Court for an in camera review of the alleged privileged material. The Court admonishes the Defendants to refrain from a wholesale designation of documents as privileged which do not meet the standards of trade secrets pursuant to Arkansas case law. Each document which is designated must include a detailed and specific explanation of why it should be accorded treatment as a trade secret. General explanations will not suffice and submissions that do not meet these standards will be denied.

The Court further finds that it is the duty of each attorney in this litigation to provide complete and truthful arguments in behalf of their clients. The Court will not tolerate attempts to mislead the Court as to status of similar litigation in this or other jurisdictions or for counsel to lack good faith in the arguments he or she makes in this litigation. Violation

of this standard will be dealt with pursuant to Rule 37 or other appropriate method.

The parties are Ordered to have their individual clients present at the final Pre-trial conference. Corporate clients are Ordered to have an officer with full authority to act for the client present at the final Pre-trial hearing.

Dated this the 10th day of January, 2005.

KIRK D. JOHNSON
KIRK D. JOHNSON
Circuit Judge

APPENDIX I

IN THE CIRCUIT COURT OF MILLER COUNTY, ARKANSAS

Case No. 2004-294-3

EVELYN J. CHIVERS, *et al.*, AS CLASS REPRESENTATIVES ON BEHALF OF ALL SIMILARLY SITUATED PERSONS,
Plaintiffs,

VS.

STATE FARM FIRE & CASUALTY COMPANY, *et al.*,
Defendants.

PARTIES' AGREED PROPOSED REVISED CASE SCHEDULING ORDER[1]

February 10, 2006	Deadline for Parties to Submit An Agreed Protective Order
February 24, 2006	Deadline for Parties to object or answer any discovery that was outstanding at the time

[1] The Defendants expressly reserve and do not waive the arguments set forth in their prior filings regarding the appropriate scheduling, timing and sequencing of deadlines and hearings, including but not limited to their constitutional and due process arguments. *See, e.g.*, State Farm Defendants' Motion for a Scheduling Conference (filed Nov. 18, 2004); Defendants' Response to Plaintiffs' Motion for Entry of Scheduling Order (filed Dec. 16, 2004). However, notwithstanding those arguments and objections to the scheduling orders the Court ultimately issued, the Defendants recognize that the Court implicitly overruled Defendants' arguments in the Scheduling Order (entered Jan. 7, 2005), the Amended Scheduling Order (entered Jan. 10, 2005), and the Second Amended Scheduling Order (entered Feb. 16, 2005).

	this action was removed to federal court; Deadline for the Parties to supplement any discovery response that had been answered before this action was removed to federal court. (The Court will not entertain motions to compel discovery filed prior to February 24, 2006.);[2]
April 3, 2006	Deadline to add additional parties without leave of court;[3]
June 23, 2006	Deadline for Plaintiffs to designate expert witnesses in support of class certification, to provide expert report summaries and to designate fact witnesses that may be offered by Plaintiffs live or via affidavit at the class certification hearing;
July 21, 2006	Deadline for Defendants to designate expert witnesses in opposition to class certification, to provide expert report summaries and to designate fact

[2] This deadline is not intended to prevent the parties from: (a) further supplementing discovery; (b) filing motions for sanctions; (c) serving new discovery; (d) serving third-party discovery; (e) taking depositions prior to February 24, 2006; (f) meeting and conferring regarding outstanding discovery.

[3] Plaintiffs reserve the right to seek leave of court to add additional parties after this date. In addition, this deadline should not he deemed to preclude any Defendant from filing an objection to the addition of further parties.

	witnesses that may be offered by Defendants live or via affidavit at the class certification hearing;
August 11, 2006	Deadline for Plaintiffs to designate rebuttal expert witnesses in support of class certification, to provide rebuttal expert report summaries and to designate rebuttal fact witnesses that may be offered by Plaintiffs live or via affidavit at the class certification hearing;
August 26, 2006	Deadline to complete depositions of Plaintiffs' expert witnesses in support of class certification and any fact witnesses Plaintiffs intend to call live or via affidavit at the class certification hearing;
September 8, 2006	Deadline to complete depositions of Defendants' expert witnesses in opposition to class certification and any fact witnesses Defendants intend to call live or via affidavit at the class certification hearing;
September 15, 2006	Deadline for Plaintiffs to file Amended Class Action Complaint without Leave of Court;
September 21, 2006	Deadline to complete depositions of Plaintiffs' rebuttal expert witnesses in support of class certification and any rebuttal

	fact witnesses Plaintiffs intend to call live or via affidavit at the class certification hearing;
September 29, 2006	Deadline for Plaintiffs to file Motion for Class Certification;[4] and Deadline for Defendants to file renewed Motions to Dismiss under Rules 8(a), 9(b), 12(b)(6) and 12(b)(1) and Motions to Sever.
October 13, 2006	Deadline to complete discovery on issue of class certification, except for the depositions of certain expert and fact witnesses addressed by separate preceding deadlines (the inclusion of this deadline is not meant to imply that discovery is in any way limited to class certification discovery or that merits discovery will be stayed after this deadline);
October 27, 2006	Deadline for Plaintiffs to file Responses to Defendants' Motions to Dismiss under Rules 8(a), 9(b), 12(b)(6) and 12(b)(1) and Defendants' Motions to Sever; Deadline for Defendants to File Response to Plaintiffs' Motion for Class Certification;

[4] Without conceding that Arkansas law requires the submission of a trial plan, Plaintiffs agree to submit a trial plan with their Motion for Class Certification.

November 10, 2006	Deadline for Defendants to file Reply Briefs to Plaintiffs' Response to Defendants' Motions to Dismiss under Rules 8(a), 9(b), 12(b)(6) and 12(b)(1) and Defendants' Motions to Sever; Deadline for Plaintiffs to file Reply to Defendants' Response to Plaintiffs' Motion for Class Certification;
November 17, 2006	Parties to exchange and file with the Court exhibit lists and pre-marked exhibits for class certification hearing and Rule 8(a), 9(b), 12(b)(1), 12(b)(6) and Motion to Sever hearings;
November 28, 2006	Hearing date for Motions to Dismiss under Rule 8(a), 9(b), 12(b)(1), 12(b)(6) and Motions to Sever;[5]
November 29-30, 2006	Hearing date for Motion for Class Certification;
January 12, 2007	Deadline for parties to file proposed findings of fact and conclusions of law related to class certification.
	PARTIES DO NOT PROPOSE ANY DATES BEYOND CLASS CERTIFICATION.

[5] Defendants reserve the right to request that briefing and hearing on the above-referenced motions be scheduled on a earlier date.

Dated: January 27, 2006

Agreed to in substance and form:

[Illegible]
One of the Attorney's for Plaintiffs

[Illegible]
One of the Attorneys for Allstate Defendants

[Illegible]
One of the Attorneys for State Farm Defendants

[Illegible]
One of the Attorneys for the Foremost Defendants

[Illegible]
One of the Attorneys for Nationwide Defendants

[Illegible]
One of the Attorneys for Farm Bureau Defendants

[Illegible]
One of the Attorneys for Chuob Defendants

[Illegible]
One of the Attorneys for Farmers Defendants

/s/ Kirk D. Johnson 1/27/06
Circuit Judge

APPENDIX J

IN THE CIRCUIT COURT OF
MILLER COUNTY, ARKANSAS
CIVIL DIVISION

NO. CV-2004-294-3

EVELYN CHIVERS, HAVEN and LINDA TYSON, MARY LYNN FREEMAN, JAMES JOINER, DANIEL JOE SHERROUSE, BILL FEELY, DALE DROSTE, JARL CARTWRIGHT, BRAD SCHOONOVER, JOHN and GLORIA LANG, PHILLIP and CYNDI ALEXANDER, BERNE FRANCIS, and DIANNE THORNTON, Individually and as Class Representatives on Behalf of All Similarly Situated Persons,
Plaintiffs,

v.

STATE FARM FIRE & CASUALTY COMPANY, *et al.*,
Defendants.

AMENDED SCHEDULING ORDER

It is hereby Ordered that the following schedule of deadlines are in effect until further order of this Court since the parties were unable to reach agreement upon a mutually agreeable scheduling order. This schedule will be strictly adhered to by all parties. Parties may present a Scheduling Order that amends this order by agreement if it does not interfere with the Court's scheduled hearing dates. The Court will not deviate from this order without good cause shown except by agreement of all of the parties.

November 1, 2007:	Deadline to add additional parties without leave of Court;
November 26, 2007:	Deadline for Plaintiffs to designate expert witnesses in support of class certification, to provide expert report summaries and to designate fact witnesses that may be offered by Plaintiffs live or via affidavit at the class certification hearing.
December 13, 2007:	Deadline for Defendants to complete production of claim files and file under seal with the Court a list containing the names and addresses of the policyholders whose files have been provided, as more fully explained in the Court's September 14, 2007;
January 14, 2008:	Deadline for Defendants to designate expert witnesses in opposition to class certification, to provide expert report summaries and to designate fact witnesses that may be offered by Defendants live or via affidavit at the class certification hearing;
February 15, 2008:	Deadline for Plaintiffs to designate rebuttal expert witnesses in support of class certification, to provide rebuttal

	expert report summaries and to designate rebuttal fact witnesses that may be offered by Plaintiffs live or via affidavit at the class certification hearing;
April 14, 2008:	Deadline for Plaintiffs to supplement expert reports to include analysis of claim files;
May 14, 2008:	Deadline for Defendants to supplement expert reports to include analysis of claim files;
May 15, 2008:	Deadline to complete depositions of Plaintiffs' expert witnesses in support of class certification and any fact witnesses Plaintiffs intend to call live or via affidavit at the class certification hearing;
June 16, 2008:	Deadline to complete depositions of Defendants' expert witnesses in opposition to class certification and any fact witness Defendants intend to call live or via affidavit at the class certification hearing;
June 23, 2008:	Deadline for Plaintiffs to file Amended Class Action Complaint without leave of Court;
July 1, 2008:	Deadline to complete depositions of Plaintiffs' rebuttal expert witnesses in support of

class certification and any rebuttal fact witnesses Plaintiffs intend to call live or via affidavit at the class certification hearing;

August 1, 2008: Deadline for Plaintiffs to file Motion for Class Certification; and deadline for Defendants to file renewed Motions to Dismiss under rules 8(a), 9(b), 12(b)(1) and 12(b)(6) and Motions to Sever;

August 1, 2008: Deadline to complete discovery on issue of class certification and fact witnesses addressed by separate preceding deadlines (the inclusion of this deadline is not meant to imply that discovery is in any way limited to class certification discovery or that merits discovery will be stayed after this deadline);

September 1, 2008: Deadline for Plaintiffs to file Responses to Defendants' Motions to Dismiss under Rules 8(a), 9(b), 12(b)(1) and 12(b)(6) and Defendants' Motions to Sever; Deadline for Defendants to File Response to Plaintiffs' Motion for Class Certification;

September 21, 2008: Deadline for Defendants to file Reply Briefs to Plaintiffs'

	Response to Defendants' Motions to Dismiss under Rules 8(a), 9(b), 12(b)(1) and 12(b)(6) and Defendants' Motions to Sever; Deadline for Plaintiffs to file Reply to Defendants' Response to Plaintiffs' Motion for Class Certification;
September 28, 2008:	Parties to exchange and file with the Court exhibit lists and pre marked exhibits for class certification and Rule 8(a), 9(b), 12(b)(1), 12(b)(6) and Motion to Sever hearings;
October 28, 2008:	Hearing date for Motions to Dismiss under Rule 8(a), 9(b), 12(b)(1) and 12(b)(6) and Motions to Sever;
October 29, 2008:	Hearing date for Motion for Class Certification;
November 13, 2008:	Deadline for parties to file proposed findings of fact and conclusions of law related to class certification.

Dated this the 16th day of October, 2007.

/s/ Kirk D. Johnson
CIRCUIT JUDGE

APPENDIX K

IN THE CIRCUIT COURT OF MILLER COUNTY, ARKANSAS

No. CV-2004-294-3

EVELYN J. CHIVERS, *et al.*, Individually and as Class Representatives on Behalf of all Similarly Situated Persons,

Plaintiffs,

vs.

STATE FARM FIRE & CASUALTY COMPANY, *et al.*,

Defendants.

REVISED CASE SCHEDULING ORDER

It is hereby Ordered that the following schedule of deadlines are in effect until further order of this Court. This schedule will be strictly adhered to by all parties. The Court will not deviate from this Order without good cause shown.

March 30, 2009	Deadline for the Chubb Defendants to file a renewed motion to dismiss for lack of subject matter jurisdiction.
April 3, 2009	Deadline for the Foremost Defendants to file a renewed motion to dismiss for lack of subject matter jurisdiction.

April 29, 2009	Deadline for Plaintiffs to file Motion for Class Certification. Deadline for Plaintiffs to file and serve expert reports and/or expert affidavits for any expert Plaintiffs intend to rely upon at the class certification hearing. The filing of Plaintiffs' expert reports and/or expert affidavits shall constitute Plaintiffs' designation of expert witnesses in support of class certification.
April 29, 2009	Deadline for Defendants to file renewed Motions to Dismiss under Rule 8(a), 9(b), and 12(b)(6) and Motions to Sever.
April 14, 2009	Deadline for Plaintiffs to file their Response to the Chubb Defendants' renewed motions to dismiss for lack of subject matter jurisdiction.
April 20, 2009	Deadline for Plaintiffs to file their Response to the Foremost Defendants' renewed motion to dismiss for lack of subject matter jurisdiction.
April 24, 2009	Deadline for the Chubb Defendants to file their Reply on their renewed motions to dismiss for lack of subject matter jurisdiction.

May 20, 2009	Deadline for Defendants to complete depositions of Plaintiffs expert witnesses who have submitted expert reports and/or expert affidavits in support of class certification.
April 29, 2009	Deadline for the Foremost Defendants to file their Reply on their renewed motion to dismiss for lack of subject matter jurisdiction.
May 4, 2009 at 9:00 a.m.	Hearing on the Chubb and Foremost Defendants' renewed motions to dismiss under Rule 12(b)(1)[1]; Hearing on the Farmers' claim file production issue.
May 27, 2009	Deadline for Defendants to File Response to Plaintiffs' Motion for Class Certification; Deadline for Defendants to file and serve expert reports and/or expert affidavits for any expert Defendants intend to rely upon at the class certification hearing. The filing of Defendants' expert reports and/or expert affidavits

[1] The Plaintiffs have stated they intend to seek deferral of Chubb's and Foremost's renewed motions to dismiss under Rule 12(b)(1) because these motions potentially delve into the merits of the litigation prior to class certification. The Court will examine this issue prior to the May 4, 2009 hearing and may cancel the hearing if the issues presented by the Rule 12(b)(1) motions delve into the merits.

	shall constitute Defendants' designation of expert witnesses in support of class certification.
May 27, 2009	Deadline for Plaintiffs to file Responses to Defendants' renewed Motions to Dismiss under Rules 8(a), 9(b), and 12(b)(6) and Defendants' Motions to Sever;
June 12, 2009	Deadline for Plaintiffs to complete depositions of Defendants' expert witnesses who have submitted expert reports and/or expert affidavits in opposition to class certification.
June 17, 2009	Deadline for Plaintiffs to file Reply to Defendants' Response to Plaintiffs' Motion for Class Certification; Deadline for Plaintiffs to file and serve expert reports and/or expert affidavits for any rebuttal expert Plaintiffs intend to rely upon at the class certification hearing. The filing of Plaintiffs' rebuttal expert reports and/or expert affidavits on this date shall constitute Plaintiffs' designation of rebuttal expert witnesses in support of class certification.
June 17, 2009	Deadline for Defendants to file Reply Briefs to Plaintiffs' Re-

	sponse to Defendants' Motions to Dismiss under Rules 8(a), 9(b). and 12(b)(6) and Defendants' Motions to Sever;
June 24, 2009	Deadline for Defendants to complete depositions of Plaintiffs' rebuttal expert witnesses who have submitted rebuttal expert reports and/or expert affidavits in support of class certification.
June 24, 2009	Deadline to complete discovery on issue of class certification (the inclusion of this deadline is not meant to imply that discovery is in any way limited to class certification discovery or that merits discovery will be stayed after this deadline);
June 26, 2009	Parties to exchange exhibit lists and pre-marked exhibits for the class certification hearing and Rule 8(a), 9(b) and 12(b)(6) and Motion to Sever hearings. The Court will only consider argument of counsel and written submissions, including affidavits and deposition testimony, at the June 30th and July 1st hearings. All exhibits Plaintiffs and Defendants intend to rely upon in support or opposition to Plaintiffs' Motion for Class Certification and Defendants'

	Motions to Dismiss under Rule 8(a), 9(b) and 12(b)(6) and Motion to Sever hearings shall be exchanged between the parties on June 26, 2009, and then offered into evidence at the June 30th and July 1st hearings.
June 30, 2009 at 9:00 a.m.	Hearing date for Defendants' renewed Motions to Dismiss under Rule 8(a), 9(b) and 12(b)(6) and Motions to Sever.[2]
June 30 - July 1, 2009 at 9:00 a.m.	Hearing date for Plaintiffs' Motion for Class Certification.
July 20, 2009	Deadline for parties to file proposed findings of fact and conclusions of law related to Plaintiffs' Motion for Class Certification. Deadline for parties to submit proposed orders related to Defendants' renewed Motions to Dismiss under Rule 8(a), 9(b) and 12(b)(6) and Motions to Sever.

[2] Plaintiffs have stated that they intend to seek deferral of certain motions to dismiss filed by Defendants on the basis that these motions delve into the merits of Plaintiffs' claims prior to class certification. The Chubb Defendants and Foremost Defendants contend that the Court should hear the threshold issue of subject matter jurisdiction at this time and that such issue does not require a determination of the merits of Plaintiffs' claims. The Court will examine this issue prior to the May 4, 2009 hearing and may cancel the hearing if the issues presented by the Rule 12(b)(1) motions delve into the merits of Plaintiffs' claim.

	IF AND WHEN IT MAY BECOME NECESSARY, THE COURT WILL SCHEDULE ADDITIONAL DEADLINES.

The Court fully expects amendments to this Revised Scheduling Order after the June 30 - July 1, 2009 dates currently scheduled for the Class Certification Hearing.

Dated this 3rd day of April, 2009.

/s/ Kirk D. Johnson
Honorable Kirk D. Johnson
Circuit Court Judge

APPENDIX L

IN THE CIRCUIT COURT OF MILLER COUNTY, ARKANSAS CIVIL DIVISION

NO.: CV-2004-294-3

EVELYN J. CHIVERS, HAVEN and LINDA TYSON, MARY LYNN FREEMAN, JAMES JOINER, DANIEL JOE SHERROUSE, BILL FEELY, DALE DROSTE, JARL CARTWRIGHT, BRAD SCHOONOVER, JOHN and GLORIA LANG, PHILLIP and CYNDI ALEXANDER, BERNE FRANCIS, and DIANE THORNTON, Individually and as Class Representatives on Behalf of All Similarly Situated Persons,

Plaintiffs,

v.

STATE FARM FIRE & CASUALTY COMPANY, *et al.*,

Defendants.

ORDER DENYING PLAINTIFFS' MOTION FOR CONTEMPT ORDER GRANTING PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF CLAIM FILES

On the 4th day of May, 2009, came on for hearing the Plaintiffs' Motion for Contempt and Motion to Compel against Farmers and Defendant's Motion for Protective Order and Motion to Enforce Discovery Agreement and after a careful consideration of the Motions, Responses, exhibits, briefs and arguments of counsel, the Court finds as follows:

The Court finds that the parties entered into an agreement to produce a statistical sampling of case files to help reduce litigation costs in this case. The parties agreed that two thousand case files would be produced in lieu of all claim files as requested in Plaintiffs' discovery requests. The Court recalls that the ostensible premise for this agreement was that a statistical sampling would be used to establish damages in this case if the class were certified thus saving the Defendant millions of dollars in production costs.

To establish that the Defendant should be found in contempt, Plaintiffs must show that the Defendant failed to meet it's obligations under the agreement. The Defendant, under the terms of the agreement, was required to provide Plaintiffs a numbered list of all case files where property damage claims were made during the class period. The Defendant provided the numbered list per the agreement. The satisfaction of this condition placed the burden onto the Plaintiffs to select two thousand case files from this list before additional conditions were required to be met by Defendant. The Plaintiffs failed to select the two thousand files as required in the agreement claiming a lack of data to assist in the selection process. However, in the original agreement, there was no requirement that Defendant produce the additional data requested by Plaintiffs. Since Plaintiffs did not satisfy their duties under the agreement, the Court finds that the Defendant has not failed in it's obligations pursuant to the agreement and the Plaintiffs' Motion for Contempt is DENIED.

Motion to Compel

During the course of the litigation, the Court reviewed a number of objections by the Defendant to Plaintiffs' Motion for Discovery. Defendant has alleged that the production of all claim files as requested in Plaintiffs' discovery would be overly burdensome and expensive to the Defendant. The Court was advised that a statistical method of calculating damages had been followed in the Burgess case in Oklahoma and that a statistical sampling would suffice in this case. Based upon this understanding, and the agreement between the parties, the Court found that each Defendant should be allowed to produce two thousand case files to reduce the legal fees and costs of production which were alleged by the Defendant to be exorbitant.

The Defendant acknowledges that Plaintiffs may have had the impression that by producing these limited case files it was agreeing to use of the statistical method of calculating damages at the trial of this case. At this point, the Defendant had a duty to advise the Court that it would object to this method of calculating damages so the Court could determine if the modified discovery procedure would be sufficient to allow resolution of the issues at trial. The Defendant chose to "lie behind the log" and keep silent about it's intentions to object to the use of the statistical sampling method and reduce their costs of discovery. By this tactic, the Court was left with the distinct understanding that it was approving a procedure helpful to the Defendant by substantially reducing the costs of this litigation, helpful to the Plaintiff to allow reduced time and expense in examining all claim files, and streamlining damage issues at trial if the class were certified and to help

conserve valuable trial time for the Court in the process.

Rule 29(2) allows the Court to approve or reject any modification of discovery procedures. The comments to that section are clear that the Court has the discretion to modify, amend or reject those agreements if the situation is not conducive to a fair resolution of the case. The Court does not believe that the gamesmanship portrayed by the Defendant towards the Court is acceptable conduct of established principals of fair play and plain dealing. The Court finds that the agreement between the parties to provide two thousand case files in lieu of production of hundreds of thousands of case files is hereby rejected. The Defendant has elected to contest the validity of the statistical sampling method for damages and it cannot complain now that it will have to comply with reasonable discovery requests as it would in any other case.

The Plaintiffs' Motion to Compel is hereby GRANTED. Therefore, Farmers is ORDERED to produce to Plaintiffs all claim files requested by Plaintiffs in their July 7, 2006 discovery requests within 180 days. It is further ORDERED that Defendant shall produce these files to Plaintiffs in single page .TIFF files with a load file with document boundaries. All costs of this production shall be borne by the Defendant, Farmers.

The Defendant's Motion for Protective Order and Motion for an Order to Enforce Discovery Agreement is hereby DENIED in its entirety.

IT IS THEREFORE ORDERED AND ADJUDGED that the Plaintiffs' Motion for Contempt and Sanctions is hereby denied; the Plaintiffs' Motion to

Compel is granted; the Defendant is ordered to produce all claim files in the format stated above within 180 days, Defendant's Motion for Protective Order and Order to Enforce Discovery Agreement is denied.

Dated this 1st day of July, 2009.

/s/ Kirk D. Johnson
KIRK D. JOHNSON
CIRCUIT JUDGE

APPENDIX M

IN THE CIRCUIT COURT OF MILLER COUNTY, ARKANSAS

Case No. CV-2005-59-3A

JAMES BASHAM, *et al*
Plaintiffs

v.

COMPUTER SCIENCES CORPORATION, *et al*
Defendants

HEARING

Held July 1, 2010

On the 1st day of July, 2010, the above styled cause comes on to be heard before the Honorable Kirk D. Johnson, Circuit Judge of the Eighth Judicial District–South, held in Texarkana, Miller County, Arkansas.

Tabbetha A. Kopech, CCR#548
Official court Reporter
Circuit Court, Eighth Judicial District-South
Miller County Courthouse
400 Laurel Street, Room 304
Texarkana, Arkansas 71854

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* * * *

[16] February 22nd, before we appeared here and made the agreements that we did on May 10th, we should have been told that Mr. Basham is no longer with us.

And our position is we can go ahead and present our arguments on the pending motions, but we don't believe the Plaintiffs have authority at this point in time to be representing anybody in this Court and they have not had the authority to represent anybody since January 31, 2010 because the power of attorney terminated on death. So 1 can proceed and am prepared to proceed. We don't really know what to do about the Motion to Compel, but I felt like I needed to bring this to the Court's attention. We can go ahead and present our arguments on the motions, but I wanted to make sure everybody understood what our position on this is going to be. And let Mr. Johnson respond.

THE COURT: Mr. Johnson?

(Mr. John Goodson enters the hearing.)

MR. JOHNSON: Your Honor, I can understand Ms. Fletcher's frustration with that, and all I can say is, in addition to the fact that we are within the year to do so, to supplement, that we—the administrator, it's my understanding, is full willing to participate. We plan on him participating. We have every intent of maintaining the lawsuit. For strategic reasons and because there was no obvious efforts to find out that information, we didn't disclose it to her, and she's correct, and to the extent that is considered inappropriate, I apologize to her, I apologize to the Court as well, but we don't believe that it is inappropriate to do. And in terms of whether these motions still ire applicable and appropriate, we

believe that they absolutely are, and that's why we're sere is because if we submit pleadings to substitute parties, all of these motions are still valid. I mean, the litigation is still active. And none of the motions, with the exception of perhaps the one that's seeking to redepose Mr. Basham, are still -- none of them are

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* * * *

CERTIFICATE

I, Tabbetha A. Kopech, Official Court Reporter for the Circuit Court of Miller County, Arkansas, Eighth Judicial District-South, certify that I recorded the proceedings by stenomask in the case of Basham, et al v. Computer Sciences Corporation, et al, Case No. CV-2005-59-3A, on July 1, 2010, before the Honorable Kirk D. Johnson, in Texarkana, Miller County, Arkansas;

That said recording has been reduced to a transcription writing by me, and the foregoing pages numbered 1 through 51 constitute a true and correct transcript of the proceedings held to the best of my ability, with attached exhibits.

WITNESS my hand and seal as such Court Reporter on this 11th day of July, 2010.

/s/ Tabbetha A. Kopech
Tabbetha A. Kopech, CCR#548
Miller County Courthouse
400 Laurel Street, Room 304
Texarkana, Arkansas 71854
Telephone: (870) 774-7722

APPENDIX N

AFFIDAVIT OF CHRISTOPHER BULGER

STATE OF MICHIGAN §
§
COUNTY OF KENT §

I, Christopher Bulger, after having been duly sworn, do under oath depose and state as follows:

1. "I am over the age of 21 years and am otherwise competent to make this affidavit.

2. "I am employed as the Claims Records Manager by Farmers Insurance Exchange. As the Claims Records Manager, I either have personal knowledge of the facts stated herein, or my statements are based upon my review of the business records of Farmers Insurance Exchange, Texas Farmers Insurance Company, Farmers Insurance Company, Inc., and Farmers Group, Inc. (hereinafter, "Farmers").[1]

ORDER COMPELLING PRODUCTION OF ALL CLAIM FILES

3. "In Plaintiffs' July 7, 2006 Requests for Production of Documents to Farmers, Plaintiffs requested that Farmers produce (in single page TIFF format with document boundaries and load files) the following documents: 'for each State in the United States where you conduct business . . . each and every closed HOMEOWNER'S CLAIM file' during the 'RELEVANT TIME PERIOD,' which is defined as the period from 'September 6, 1996 to the date these

[1] Farmers Group, Inc. does not write insurance and, consequently, has no responsive homeowners' closed claim files.

Interrogatories or Requests for Production are answered or supplemented.'

4. "On July 1, 2009, Farmers was ordered "to produce to Plaintiffs all claim files requested by Plaintiffs in their July 7, 2006 discovery requests within 180 days . . . in single page TIFF files with document boundaries."

FARMERS' STRATEGY FOR PRODUCING ALL CLAIM FILES

5. "Upon receiving the Court's Order, Farmers' management began determining the most expedient way in which it could produce all of the claim files. After review of the file retention structure, Farmers planned three parallel processes to locate relevant files: (1) production of electronically stored files; (2) indexing of two vendor locations; (3) detailed search of remaining vendor locations.

6. "Prior to 2001, all closed claim files were stored as paper files (referred to as "Legacy files"). Beginning in 2001, Farmers began a two-year process of transitioning to electronic files for most closed claim files. Because not all closed claim files were stored as electronic files during this period of transition, it was necessary to review the computer record of approximately 143,000 claim files stored during the two-year transition period to determine whether they were stored as paper or electronic files. In addition, closed claim files for catastrophic losses were not stored as electronic files until 2005.

7. "Most of Farmers' Legacy files are stored in boxes off-site with Iron Mountain. In addition, Farmers contracts with Records Center Innovation and Cintas to store additional paper records, including Farmers' Legacy files.

8. "Farmers electronic files ("CRN files") are stored using two different mechanisms. A "live" CRN claim file (i.e., one that has had activity within the previous six months) contains both individual data fields, which are stored in XML format in tables, as well as scanned documents or photographs that were generated or received in connection with each claim, which are stored in PDF format. When a CRN file has been inactive for six months, it is archived. Upon archiving, the data field elements are stored as an XML "blob" in Farmers' Siebel structure.

Legacy Files

9. "For Legacy files, approximately three years ago, Farmers began indexing its closed claim files so that Farmers' personnel could determine, for a particular claim file, the box in which it was stored. Prior to approximately 2006, many of Farmers' boxes in off-site storage were not indexed in a way that reliably and accurately indicated which Legacy files were stored in which storage boxes. Instead, Farmers' records only indicated, for example, a range of policy years and range of policy numbers for a particular box. For fully indexed files, Farmers could request that Iron Mountain retrieve a particular claim file. But for most Legacy files, Farmers was left with no choice but to request entire boxes of claim files so that they could determine whether responsive claim files were located within the box.

Austin and Kansas City Locations

10. "Based upon the master list of Legacy files, Farmers determined that the Austin, Texas (covers Texas and Louisiana), and Kansas City, Missouri (covers Arkansas, Iowa, Kansas and Missouri, as well as all catastrophe files for every state since 1999),

locations contained approximately 77% of the approximately 480,772 total paper files. The responsibility for locating, preparing and scanning these files was directed to Iron Mountain and the efforts, resources and costs associated with those tasks are set forth in the Affidavit of Kevin Werwie of Iron Mountain.

Remaining Locations

11. "Farmers' personnel were tasked with locating the remaining 23% of the Legacy files, representing in excess of 110,071 claim files[1]. As explained below, this is an extraordinarily time-consuming process that requires personnel who have experience with Farmers' claim files and record storage methods.

12. "Farmers also tasked its legal counsel, Jackson Walker LLP, with the responsibility for actually producing all of the Legacy and CRN files that it could collect and is working closely with Jackson Walker LLP to facilitate that future production.

PRODUCTION OF CLAIM FILES

CRN Files

13. "As previously noted, Farmers' more recent claim files are stored electronically and are referred to as "CRN files." A CRN file contains two components: data entered and stored in fields electronically as well as images of documents or photographs that were generated within the system or received exter-

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[1] While it was initially expected that this number of files would be located by Farmers' personnel, it has subsequently been learned that approximately 40-45,000 files were not located in the Austin or Kansas City locations by Iron Mountain, and now will likely be added to the 110,071 files for which Farmers' personnel are searching. For purposes of this discussion, we assume there are 155,000 files to find in this group.

nally and scanned into the system. At the time the Court entered its order compelling production of Farmers' claim files, Farmers had the capability to produce an image of the stored documents (similar to a PDF) and a relatively rudimentary procedure to export the data fields. However, this could only be accomplished on a file-by-file basis. There was no mechanism in place that would allow Farmers to print, for example, all claim files for a particular state within a particular time frame. More importantly, Farmers had no mechanism in place that would allow Farmers to convert its electronic claim files into the single page TIFF format with load boundaries as ordered by the Court. With its resources at that time, Farmers could only print all of its electronic records—one at a time—before then scanning and converting them to single page TIFF format documents.

14. "Thus, on July 9, 2009, Farmers began the expensive process of developing software that could convert Farmers' electronic files to the format in which the Court ordered Farmers to produce its claim files. The Farmers' department responsible for this task was the Claims Information Technology department (Claims IT). The Claims IT department devoted twenty-seven (27) people to the project and expended more than 3,855 hours in designing, analyzing, constructing, testing and executing the new process.

15. "Initially, Farmers' Claims IT department had to build a software program to "read" the master list of CRN files and query the system for "live" CRN files and archived CRN files to determine in which system each claim file was stored, and then to retrieve the claim and convert the XML files into single-page TIFFs with load boundaries.

16. "To do this, the software program reads each XML file line by line and converts it into a PDF structure. The resulting PDF (created from the XML data) is very large (an average of over 100 pages per file).

17. "The remaining documents within each claim file (as noted above) are stored differently, and are found within Filenet, which is Farmers' document processing system. The multiple PDF documents within each claim file must then be "matched" to the corresponding electronic data fields that were previously stored as XML files. Finally, Farmers employs a TIFF converter to break down each very large PDF into single-page TIFFs and engages in manual auditing and quality control measures to ensure the conversion of files is working properly.

18. "The TIFFs are stored locally before being copied to send to Jackson Walker LLP for further processing and future production. Because the data being transferred contains such large volumes of highly sensitive information, special procedures have been implemented for the transfer of data to Jackson Walker LLP.

19. "The project required the creation of a new claim report generation process, a master tracking database, 25 document retrieval workstations, a job processing engine and multiple external hard drives for storing the final claim files output.

20. "Farmers Claims IT department endeavored to automate as much of the above process as possible, but many manual activities are still required. For example, manual monitoring is required to ensure that the system continues to run properly twenty-four (24) hours a day, seven (7) days a week (except

for required maintenance). Manual monitoring has been necessary because the processes described above have repeatedly caused network, system and server failures. Building and implementing new networks, systems and servers would have required 6-7 months. With such a short time frame, Farmers was unable to do so and was forced to run its CRN conversion processes through the same networks, systems and servers its personnel use to perform its day-to-day operations. Whenever a failure occurs, Farmers cannot access its open claim files to obtain information, generate or view documents or store documents that have been received. These crashes have affected or can affect every claim being handled in the CRN system. Moreover, after each failure, manual clean-up is required to delete all the files that were corrupted by the failure and re-start or re-queue the process when the server, system or network is back "online." In addition, each weekend there is a ten-hour maintenance window that must continue in order to keep the systems running for the processing of current open claims.

21. "In addition to the tremendous business interruption, Farmers has expended a great deal of time and money to develop, implement, test and run the processes described above. Farmers purchased twenty-five new desktop computers, a separate server and seven terabytes of storage. In addition, Farmers purchased new software to convert PDFs to TIFFs. Farmers' former software simply could not perform quickly enough. Farmers also obtained thirty-eight (38) external hard drives in order to ship the CRN files to Jackson Walker. Thirteen (13) of these hold one (1) terabyte each while the remaining twenty-five (25) hold 512 gigabytes.

22. "Responsive claim files are being downloaded by the programs described above 24 hours per day, 7 days a week (except for maintenance). These files are downloaded to hard drives and delivered to Jackson Walker LLP on a twice per week delivery schedule at this time for further processing and future production.

23. "At this time, Fanners has had 27 individuals including individuals located offshore—working on the CRN files alone. Those individuals have expended approximately 3,855 hours in working on this aspect of the project at a cost to Farmers at this time of approximately $214,261.00.

24. "At this time, Farmers has expended over half a million dollars (approximately $535,261—which sum also includes infrastructure costs) to comply with the Court's order requiring production of electronic claims files alone.

25. "Farmers has delivered approximately 20 million pages to Jackson Walker LLP and expects to deliver approximately 13 million additional pages to Jackson Walker LLP before December 28, 2009.

26. "Farmers expects to complete conversion of its electronic files before December 28, 2009.

Legacy Files

27. "As mentioned above, Iron Mountain was tasked with retrieving, sorting and imaging the Legacy files found in the Austin and Kansas City locations, while Farmers' personnel are responsible for locating, requesting and sorting the remaining Legacy files before returning them to Iron Mountain for imaging. The department responsible for obtaining these files is the Claims Specialized Services

("CSS") department, which falls under the Claims Support and Solutions division.

28. "These files are being pulled from Iron Mountain storage sites in the following states: Arizona (covers Arizona, Nevada and New Mexico); Ohio (covers Alabama, Georgia, Indiana, Kentucky, Ohio, Mississippi, Tennessee, Virginia, plus occasionally files from other states); Colorado (covers Colorado, Nebraska, North Dakota, South Dakota and Wyoming); Texas (other than Austin facility and includes Louisiana); Michigan; California; Illinois (covers Illinois, Wisconsin and subrogation files from multi-states); Minnesota; Oregon (covers Oregon and Washington); Utah (covers Idaho, Montana, Utah and is a multi-state repository); Maryland (covers Georgia, Kentucky, Maine, Maryland, Mississippi, New Hampshire and North Carolina). In addition, files are also being pulled from the Records Center Innovation location in Arizona (covers Arizona, Nevada and New Mexico), as well as from the Cintas location in Ohio.

29. "This task would prove even more difficult for the storage facilities in Colorado and Arizona. The Colorado facility contains claim files from five different states (Colorado, Nebraska, North Dakota, South Dakota and Wyoming). Thus, Farmers' personnel had to check the contents of the box against the master lists for responsive claim files from five different states. A similar process was employed for the Arizona storage facility, at which claim files from three different states (Arizona, Nevada and New Mexico) are stored.

30. "Of the approximate 155, 000 files, approximately 44,392 files did not have a claim number. A claim file would not have a claim number if, for

example, the agent paid the customer (an "agent-paid" file). Upon encountering a claim file with no claim number, Farmers' personnel would have to access Farmers' Automated Claims Tracking System ("F.A.C.T.S.") to verify that the claim occurred and was reflected on the policy. Because of the age of some of these claim files, F.A.C.T.S. did not always contain this information. In that situation, additional manual review was required to determine the type of loss, state of loss and date of loss before a claim file could be determined to be responsive.

31. "To obtain the approximate 155,000 claim files, Farmers' personnel would request the boxes in which it was most likely the claim files would be located. When the box was delivered, Farmers' personnel would then manually review the box in an attempt to locate the claim file. In addition, if Iron Mountain was unable to locate a claim file that was expected to be in a particular box, Farmers' personnel would attempt to locate those files as well. For experienced Farmers' personnel, searching a storage box requires approximately thirty minutes.

32. "To date, approximately 10,832 boxes have been ordered from Iron Mountain and Farmers' other vendors. Through manual review, Farmers has been able to retrieve approximately 42,000 responsive claim files.

33. "In addition, any boxes pulled by Iron Mountain in the Austin and Kansas City locations in which they cannot determine with certainty if the box contains possible class claim files, are diverted for review by Farmers. To date, Farmers has received a total of 613 boxes from Austin and 268 boxes from Kansas City as diversion boxes requiring individual review.

34. "Farmers maintains two on-site locations where Legacy claim files might be stored—Pocatello, Idaho, and Simi Valley, California. Farmers' personnel searched these two locations first for any potential class claim files.

35. "A few Branch Claims Offices might have a few Legacy claim files that have not been sent for storage to Pocatello, Idaho, since Farmers converted to the CRN system between 2001 and 2002, but this possibility is highly doubtful. Annual surveys are sent to the Branch Claims Offices requesting any Legacy claim files in their possession be sent to Pocatello, Idaho, for indexing, preparation for storage and finally to storage.

36. "Responsive claim files are then sent to a dedicated Iron Mountain scanning facility in Salt Lake City, Utah, every two weeks. After Iron Mountain completes its imaging of the claim files, the claim files are delivered electronically to Jackson Walker LLP for further processing and future production.

37. "Based upon past experience, Farmers would expect to locate between 85% and 95% of the claim files it has been ordered to produce. There are many reasons it may not be feasible to produce a particular claim file. For example, the claim file may be in a different storage location due to a misfiling, or the claim file may not be in storage because it is being used elsewhere, such as in a branch claims office, as part of a quality assurance review, or in connection with litigation. Also, the expected location of a claim file may be inaccurate, which may be because of a clerical error, such as recording the incorrect box number, recording the incorrect storage vendor, or recording the incorrect storage location, or because

the person identifying the expected box location did so inaccurately. Moreover, despite the highest degree of precautionary measures, some claim files may have been irreparably damaged by the elements, pests or other natural causes.

38. "The CSS department consists of a Legacy file group, a stale and escheat team, and a bill paying unit. Cheri DeWall is the Legacy File Manager and is responsible for the Legacy file group. In addition to herself, Ms. DeWall has nine (9) full-time employees and another supervisor/manager. All nine (9) full-time employees have been working on this project. Because of the enormity of this project, the CSS-Legacy employees typically are able to spend only two (2) hours per day on their normal tasks and have been devoting 75% of their time to this project. Ms. DeWall has regularly been working sixty hours a week on this project, routinely working past 10:00 p.m. and on weekends, since she received the first list of files she was responsible for pulling in mid-July, 2009. In addition, Ms. DeWall has one (1) contract employee and twenty-four (24) temporary employees working full-time to complete this project. Most of the CSS-Legacy group works in Pocatello, Idaho, while some work in Simi Valley, California.

39. "These employees have spent approximately 24,776 hours working on this project as of the date of this affidavit. Many of the CSS-Legacy group's usual business tasks and responsibilities have been postponed so that this group—with the experience and knowledge necessary to locate and retrieve the paper files—can dedicate their resources to this task. For example, the CSS-Legacy group can no longer consolidate and transfer Farmers' on-site paper files to

off-site locations of Iron Mountain for long-term storage.

40. "Farmers reasonably expects to locate between 5,000 and 7,000 additional files (in addition to those from the Austin and Kansas City locations) by December 28, 2009.

41. "At this time, Farmers has expended over $330,000.00 on Legacy files to comply with the July 1, 2009 Order. These costs will continue to be incurred until further orders are entered in this case.

CURRENT STATUS AND EXPECTED COMPLETION

42. "Farmers has delivered in excess of 20 million pages of CRN claim files to Jackson Walker LLP as of the date of this affidavit, and anticipates delivering approximately 13 million additional pages to Jackson Walker LLP before December 28, 2009. Farmers has located approximately 42,000 Legacy claim files to be delivered to the Iron Mountain facility in Salt Lake City for imaging and then delivery to Jackson Walker LLP for future production. Farmers anticipates being able to locate 5-7,000 additional Legacy files before December 28, 2009.

43. "Farmers has expended in excess of 28,631 hours working on this project through the date of this affidavit, at a cost in excess of $865,261 to date.[3] The projected total cost cannot be ascertained until the total project is completed.

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[3] In addition, Farmers has incurred costs with Iron Mountain of $4,798,349.37 for their assistance it: this project, and anticipate being billed another $1,077,634.63 by the completion of the project as more fully described in the affidavit of Kevin Werwie.

FURTHER AFFIANT SAYETH NOT.

/s/ Christopher Bulger
Christopher Bulger

SUBSCRIBED AND SWORN BEFORE ME on this 4th day of December, 2009

/s/ Patricia C Roempke
Notary Public, State of Michigan
My commission expires: 3-11-2015

[NOTARY STAMP]
Patricia C Roempke
Notary Public, State of MI
County of Barry
My commission expires: Mar 11, 2015
Acting in County of Kent

APPENDIX O

AFFIDAVIT OF KEVIN WERWIE

STATE OF MINNESOTA

COUNTY OF DAKOTA

I, Kevin Werwie, after having been duly sworn, do under oath depose and state as follows:

1. "I am over the age of 21 years and am otherwise competent to make this affidavit.

2. "I am an Enterprise Account Executive for Iron Mountain.

3. "I have been employed by Iron Mountain for almost eight years, beginning in 2002.

4. "I either have personal knowledge of the facts stated herein, or my statements are based upon my review of the business records of Iron Mountain.

5. "As an Enterprise Account Executive, I am responsible on a worldwide basis for the Zurich account with Iron Mountain, including the storage and, if necessary, retrieval of paper claim files of Farmers Insurance Exchange, Texas Farmers Insurance Co., and Farmers Insurance Co., Inc. ("Farmers"). In that role, I have been personally involved in managing the overall Zurich/Farmers account relationship for approximately five years. As the Enterprise Account Executive, my role is to support the client's strategic program objectives and advise on records and information management best practices. This includes oversight of large project implementations or other program development initiatives.

6. "Iron Mountain is a global leader in the records management, secure shredding and digital information

protection and storage solutions industry. For example, Iron Mountain has:

a. "Over 1,000 record centers and data vaults comprising 64 million square feet worldwide;

b. "335 million cubic feet of hard copy records stored;

c. "Over 10 million linear feet of medical records under management;

d. "60 million pieces of data stored in highly secure data protection vaults;

e. "1.4+ petrabytes of mirrored digital data;

f. "Over 2.5 million PCs backed up and 70 million digital files restored to date; and

g. "3,500 vehicles making 18 million trips a year worldwide.

7. "Iron Mountain currently stores approximately 1.1 million total cubic feet of hard copy records for Farmers in North America. On July 9, 2009, Farmers contacted Iron Mountain to obtain our assistance in producing the approximately 440,000 homeowner's claim files that were being stored by Iron Mountain.

8. "Iron Mountain stores Farmers' hard copy records in 37 Iron Mountain markets. Iron Mountain and Farmers entered into a statement of work whereby Iron Mountain undertook the task of retrieving , indexing, imaging and delivering relevant Legacy hard copy claim files, most of which—289,253 files—were initially expected to be in Austin, Texas, and another 85,394 files were initially expected to be in Kansas City. These two markets were expected to comprise approximately 85% of the volume of the

claim files to be produced.[1] The remainder of the responsive claim files stored by Iron Mountain and requested by Farmers, of which there were expected to be approximately 110,000, are spread out among 10-12 different states.

9. "In order to identify the claim files that would be produced, it was first necessary to manually identify the file and compare each file to the list of claim files that Farmers provided to determine whether a particular file would or would not be imaged for production. Although initial estimates suggested an average of 40 claim files would be contained in each box, actual experience revealed there were closer to an average of 60 claim files per box.

Austin and Kansas City Markets

10. "As the project progressed, Iron Mountain learned that over 100,000 of the files thought to be in Austin, Texas, were actually located in Kansas City. Consequently, Iron Mountain had to re-allocate and shift resources to support the dramatic increase in claim files in Kansas City. This re-allocation impacted the personnel hired and utilized, the shifts that were working and the number of scanners and other necessary equipment in both Austin and Kansas City.

11. "At project peak, Iron Mountain had approximately 464 individuals dedicated to this project in Austin and Kansas City alone. These individuals have been tasked with sorting through the boxes to identify responsive claim files, preparing the respon-

---

[1] In Iron Mountain's experience, both with Farmers and other clients, it is not realistic to expect 100% find rates because some files may be in a different location than Farmers identified, or records may be out to users, or records may be misplaced, etc.

sive claim files to be imaged, imaging the claim files and performing quality control measures to ensure the imaged files are responsive files and comply with the technical specifications required for production. Approximately 28,000 square feet of space has been dedicated for this project in Kansas City and approximately 16,000 square feet in Austin. These various project stages are explained in greater detail below.

12. "In addition, Iron Mountain personnel at the other locations where Farmers' files are stored have been pulling boxes as requested for review by Farmers' personnel in Pocatello, Idaho, as is more fully detailed in the Affidavit of Christopher Bulger.

13. "Because there was limited indexing of files within a box, Iron Mountain personnel had to go through each box believed to contain responsive claim files to identify and list the claim file numbers that were within each box. This list was then compared to the list of claim files that Farmers provided in order to isolate responsive claim files. Approximately 6.3 million files had to be listed by claim number and then compared to the list of claim files to be produced in order to identify the responsive claim files. This is referred to as the sorting process. After the sorting process, a quality control ("QC") supervisor in both Austin and Kansas City performs QC on a percentage of the total sorted material validating 100% systematic alignment between a box and listed files contained within the box.

14. "Initially, estimates suggested that it would take an average of fifteen (15) minutes per box to perform the sorting process. Actual experience revealed that each box required approximately twenty-two minutes to perform this process, representing nearly

50% more time per box that was required. In order to meet our deadlines, this increase required Iron Mountain to increase the number of sorting workstations by approximately thirty percent (30%) and employ the sorting personnel in two shifts, six days a week.

15. "Throughout the project, the Austin location has had up to 100 sorters working per day between two shifts on Monday through Saturday. The Kansas City location had up to 88 sorters working per day between two shifts on Monday through Saturday. Between these two locations, at project peak, Iron Mountain was devoting 1,410 person-hours a day (7.5 hours per shift per employee), six days a week, or approximately 8,460 hours each week to sorting alone. In addition, each week, approximately twenty-nine (29) Iron Mountain supervisors from across the United States have been flown to either Austin or Kansas City to oversee the sorting process, ensuring that experienced personnel are "on-location" to oversee the sorting process.

16. "After the boxes have been sorted to identify responsive claim files, the responsive claim files must be prepared for imaging. In addition to loose standard letter-sized papers, Farmers' claim files contain irregularly sized items such as loose photographs, receipts, rolls of register tape and envelopes. In addition, documents within a claim file may be stapled, paper-clipped or folded. Prior to scanning the file, all paper clips and staples must be removed, and small irregularly-sized items must be taped to another sheet of paper before they can be scanned. Once the scanning is complete, all of the papers must be returned to the claim file.

17. "The Austin location had between 110 and 130 individuals total working between two shifts, six days

a week to prepare the claim files for imaging. The Kansas City location has had up to 80 individuals working between two shifts, six days a week to prepare the claim files for imaging, in addition to 30 individuals utilized in St. Louis. Between these locations, Iron Mountain is devoting between 1,650 and 1,800 person-hours a day, six days a week, or approximately 9,900-10,800 hours each week to preparing the claim files for imaging.

13. "On November 30, 2009, Iron Mountain increased the number of individuals working to prepare the claim files in Kansas City for imaging in order to add a third shift. This added approximately 24 persons at 7.5 hours per day, seven days a week, for a total of approximately 1,260 additional hours per week to preparing the claim files for imaging.

19. "Initial estimates suggested that preparing a box of files as outlined above would require approximately two hours. Actual experience revealed that each box required approximately four hours to prepare the files contained therein. This was a 100% increase and required Iron Mountain to again increase the number of personnel devoted to the project. Iron Mountain utilized the resources of three different temporary agencies to secure the necessary personnel to prepare the claim files in Austin alone.

20. "After a file has been identified and prepared for imaging, the scanning process begins. Iron Mountain has dedicated 24 scanning machines at project peak in Austin, Kansas City and Salt Lake City. In Austin, there are 38 individuals who are employed to scan claim files, converting them to digital format. In Kansas City, there are 18 individuals who are employed to scan claim files, converting them to digital format. In Salt Lake City, there are 6 individuals

who are employed to scan claim files, converting them to digital format. These individuals work in two shifts each day, six days a week, devoting approximately 2,790 hours each week to imaging the claim files. In addition, Iron Mountain has three (3) dedicated imaging engineers flying to and from the various locations as needed, working a combined 120+ hours per week, to support set-up, daily data uploads, back-end QC, trouble-shooting and take-down.

21. On November 30, 2009, Iron Mountain increased the number of individuals working on the imaging of the claim files in both Austin and Kansas City in order to add a third shift. This added approximately 11 persons in Austin and 6 persons in Kansas City at 7.5 hours per day, seven days a week for a total of approximately 892 additional hours per week to the imaging of the claim files.

22. "Iron Mountain employs quality control measures to ensure that the imaged claim files are suitable for production. The Austin location has eight (8) quality control stations and two (2) validation/ verification stations. Kansas City has four (4) quality control stations and one (1) validation/verification station. At the quality control stage, Iron Mountain personnel look at the electronic images to confirm that the hard copy documents have been electronically captured in a manner that conforms to the quality and technical specifications required for production. Finally, at the validation/verification stage, Iron Mountain ensures that separator sheets are included and that the claim file being scanned is a claim file on the list provided by Farmers with the claim number captured accurately. Iron Mountain

employs the ANSI/ASQ[2] standard Z1.4 for quality control which is a well-accepted practice within the industry.

23. "In total, at project peak, Iron Mountain has dedicated between 511 and 531 individuals to the task of producing and imaging the hard copy claim files from Austin and Kansas City. By deploying such a large number of individuals and equipment, the Austin location has been able to ramp up capacity to approximately 350,000 images per day, while the Kansas City location is able to produce approximately 275,000 images per day.

24. "After the claim files have been imaged at the Austin location, the electronic data is transferred onto a "flash drive." Each flash drive has a capacity of 16 to 32GB of information. Iron Mountain sends the flash drives with images produced for the day on Tuesdays-Thursdays to Jackson Walker LLP in Dallas, Texas, so that Jackson Walker LLP can upload them for further processing and future production. Because of the incredibly sensitive nature of the information contained on the flash drives, Iron Mountain utilizes FedEx White Glove delivery service and encrypts and password protects the drive to ensure high security and places them in secure locked transport containers to maintain the chain of custody. The keys to such containers are in the possession of Iron Mountain personnel and Jackson Walker LLP personnel.

25. "The delivery of electronic data from the Austin location on Friday-Sunday is done over a secure FTP

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[2] ANSI is the American National Standards Institute. ASQ is the American Society for Quality and was formerly known as ASQC (American Society for Quality Control).

site directly from Iron Mountain to Jackson Walker LLP.

26. "After the claim files are imaged in Kansas City, the electronic data is transferred to Jackson Walker LLP through the secure FTP site six days per week.

Remaining Markets

27. "To retrieve the remaining claim files not located in Austin or Kansas City, Farmers' personnel request particular boxes from the various Iron Mountain storage facilities. These requests are submitted electronically through Iron Mountain Connect. Iron Mountain employees then retrieve the requested boxes and ship them to Pocatello, Idaho, where Farmers' personnel isolate the responsive claim files. Iron Mountain then retrieves the responsive claim files and transports them to Salt Lake City for imaging.

28. "In Salt Lake City, Iron Mountain personnel then prepare and image the files before returning the files to storage. To date, approximately 39,000 claim files have been identified by Farmers' personnel, approximately 23,000 of which have been received by Iron Mountain in this fashion. There are three (3) scanners and seven (7) individuals working in Salt Lake City and this location is capable of producing an average of approximately 25,000 images per day.

29. "After the claim files are imaged at the Salt Lake City location, the electronic data is transferred to Jackson Walker LLP through the secure FTP site up to six days per week.

30. "At this time, Iron Mountain has finished the process of identifying and sorting the claim files from the Austin and Kansas City locations. A total of

327,842 responsive claim files were found at these two locations. A total number of 193,296 files, from these two locations as well as Salt Lake City, have been imaged and transmitted to Jackson Walker LLP as of December 3, 2009.

31. "At this time, based on average file size, Iron Mountain has 107,840 claim files in the imaging process, and 38,269 claim files in the post-imaging QC and validation process.

32. "Iron Mountain expects to complete and transmit 341,523 claim files to Jackson Walker LLP on or before December 28, 2009.

33. "As of the date of this Affidavit, Iron Mountain has billed Farmers $4,798,349.37.

34. "Under the terms of the initial agreement with Farmers, Iron Mountain anticipates billing another $1,077,634.63 to Farmers."

FURTHER AFFIANT SAYETH NOT.

/s/ Kevin Werwie
Kevin Werwie
Enterprise Account Executive,
Iron Mountain

SUBSCRIBED AND SWORN BEFORE ME on this 4th day of December. 2009.

/s/ Kristen Ann Randall
Notary Public, State of Minnesota
My commission expires: 1/31/14

[NOTARY STAMP]
Kristen Ann Randall
Notary Public
Minnesota
My commission expires: January 31, 2014

APPENDIX P

[LOGO]
JACKSON WALKER L.L.P.
ATTORNEYS & COUNSELORS

Linda C. Zander, Paralegal
(512) 236-2032 (direct)
(512) 391-2168 (direct fax)
lzander@jw.com

July 1, 2010

Nix, Patterson & Roach, LLP Hand Delivered
3600 North Capital of Texas Highway
Building B, Suite 350
Austin, TX 78746

Re: Case No. CV-2004-294-3 *Evelyn J. Chivers, et al. v. State Farm Fire & Casualty Company, et al.* - In the Circuit Court of Miller County, Arkansas

Dear Plaintiffs' Counsel:

Pursuant to the court's July 1, 2009 Order, and its letter of December 23, 2009, we are delivering herewith a hard drives (labeled FCO27) containing supplemental document production bearing Bates Nos. Farmers_CF_033671339-Farmers_CF_034270570, Farmers_CF_054593217- Farmers CF 055729677 and Farmers CF 120000001-Farmers CF 120689236. This supplemental production represents an additional 24,000 claim files or 2,424,929 pages. These documents are also being produced pursuant to the terms of the Protective Order entered by the court and filed of record on or about February 10, 2006, subject to Rule 26(b)(5), and without waiving any outstanding objections. Pursuant to the terms of the Protective

Order, Farmers is designating all of these documents as "Confidential."

Very truly yours,

/s/ Linda C. Zander
Linda C. Zander, Paralegal

/LCZ/5853841

Enclosure

cc Plaintiffs' Counsel of Record
(by e-mail delivery) – without enclosure

Judge Kirk Johnson
(by fax) – without enclosure

IN THE CIRCUIT COURT OF MILLER COUNTY, ARKANSAS

CASE NO. CV-2004-294-3

EVELYN J. CHIVERS, HAVEN AND LINDA TYSON, MARY LYNN FREEMAN, JAMES JOINER, DANIEL JOE SHERROUSE, BILL FEELY, DALE DROSTE, JARL CART WRIGHT, BRAD SCHOONOVER, JOHN AND GLORIA LANG, PHILLIP AND CYNDI ALEXANDER, BERNE FRANCIS, AND DIANE THORNTON, INDIVIDUALLY AND AS CLASS REPRESENTATIVES ON BEHALF OF ALL SIMILARLY SITUATED PERSONS,

Plaintiffs,

vs.

STATE FARM FIRE & CASUALTY COMPANY, *et al.*,

Defendants.

On this the 1st day of July 2010, I, Lisa Baldwin, received from Jackson Walker, LLP a hard drive (labeled FC027) containing supplemental document production bearing Bates Nos. Farmers_CF_0336 71339-Farmers_CF_034270570, Farmers_CF_05459 3217-Farmers_CF_055729677 and Farmers_CF_ 120000001-Farmers_CF_120689236.

Nix, Patterson & Roach, LLP
3600 North Capital of Texas Highway
Building B, Suite 350
Austin, TX 78746

By: /s/ Lisa Baldwin

Printed name:_____

APPENDIX Q

IN THE CIRCUIT COURT OF MILLER COUNTY, ARKANSAS CIVIL DIVISION

DOCKET NO.: CV-2004-294-3

EVELYN J. CHIVERS, HAVEN and LINDA TYSON, MARY LYNN FREEMAN, JAMES JOINER, DANIEL JOE SHERROUSE, BILL FEELY, DALE DROSTE, JARL CARTWRIGHT, BRAD SCHOONOVER, JOHN and GLORIA LANG, PHILLIP and CYNDI ALEXANDER, BERNE FRANCIS, and DIANE THORNTON, Individually and as Class Representatives on Behalf of All Similarly Situated Persons,

Plaintiffs,

v.

STATE FARM FIRE & CASUALTY COMPANY, *et al.*,

Defendants.

ORDER ON MOTIONS FOR SANCTION AND CONTEMPT

On the 10th day of November, 2009, the Court has considered the Plaintiffs' Motions for Sanctions filed against the Defendant, Chubb, and Defendant, Chubb's, Motion for Sanctions against the Plaintiffs, and from the pleadings, statements of counsel, briefs of the parties, exhibits and finds as follows:

Issues

The Plaintiffs in their Motions for Sanctions and Contempt allege that the Defendant, Chubb, has engaged in a course of conduct to prevent discovery of

relevant material. The Plaintiffs argue that emails which were requested in Interrogatories and Requests for Production in 2005 and in subsequent requests for discovery have not been provided, the Defendant has engaged in a course of conduct to disrupt depositions by the providing of documents to be used in the deposition at the last minute, Defendant has failed to produce qualified or knowledgeable witnesses for depositions, Defendant has abused the attorney client privilege to thwart discovery and Defendant has failed to produce a privilege log as previously ordered. The Plaintiffs maintain the position that the Defendant, Chubb, was provided a copy of the Foremost order and should have complied with the findings as they related to Chubb.

The Defendant, Chubb, has filed a Motion for Sanctions against the Plaintiff for failure to meet and confer on these issues pursuant to Rule 37.

History

Plaintiffs acknowledge that they did not file a Motion to Compel because of reliance on previous rulings of the Court regarding production of emails pursuant to discovery. The Plaintiffs assert that the sanctions are appropriate since Defendant continues to refuse to produce the emails even with the Court's order pertaining to discovery issued on March 26, 2009 to Defendant, Foremost. On March 26, 2009, the Defendant, Foremost, was ordered to produce all discovery requested in Plaintiffs' First Set of Interrogatories and Requests for Production of February 11, 2005 (Interrogatory No. 21 and Requests No's. 23, 27, 67, 98, and 102), Plaintiffs' Interrogatories and Requests for Production of June 21, 2007 (Interrogatory No. 3 and Request No. 2), Plaintiffs' First Set of Interrogatories No. 50, Plaintiffs' Interrogatories and

Requests for Production of November 1, 2006 (Interrogatory No. 1 and Request No's 1 and 2), and Plaintiffs' Discovery Requests to Defendants of June 21, 2007 (Interrogatory No's 1, 3, and 5 and Request No's 1, 2 and 3). These are identical discovery requests that were propounded to this Defendant. The order of March 26, 2009 specified that the Defendant, Foremost, would produce to Plaintiffs the documents requested in discovery within thirty (30) days. The Defendant, Chubb, has previously produced quality assurance documents or their equivalent pursuant to the Plaintiffs' discovery requests and that is not an issue in this case as it was in Foremost. At issue in these motions is the failure of the Defendant. Chubb, to produce all discovery requested in Plaintiffs' First Set of Interrogatories and Requests for Production of February 11, 2005 (Interrogatory No. 21 and Requests No's. 23, 27, 67, 98, and 102).

Emails

The facts show that the Defendant, Chubb, has refused for years to comply with discovery requests of Plaintiffs regarding production of emails unless it could dictate the parameters of the search. The Defendant has refused to provide emails as requested unless the Plaintiffs agreed to allow the Defendant to comply by using a limited list of key words and by designating a limited number of employees or officers to be subjected to the search for relevant emails. This unilateral position regarding production was challenged by Plaintiffs in a Motion to Compel and Motion for Contempt against the Defendant, Foremost, leading to the order of March 26, 2009. In that order, the Court rejected this unilateral approach and ordered the Defendant, Foremost, to produce all emails and quality assurance documents requested in

Plaintiffs' First Set of Interrogatories and Requests for Production of February 11, 2005 (Interrogatory. No. 21 and Requests No's. 23, 27, 67, 98, and 102) and Plaintiffs' Interrogatories and Requests for Production of June 21, 2007 (Interrogatory No. 3 and Request No. 2).

After the Foremost order was entered on March 26, 2009, the Defendant, Chubb, made no effort whatsoever to comply with the order to produce the emails set forth in Plaintiffs' discovery requests taking the position that it was not a party to that order (Foremost) and was not ordered to produce its emails. The Defendant does not contest the relevancy of the emails but objects to their production as unduly burdensome, time consuming and expensive. The Defendant, Chubb, continued to refuse to produce the emails even though it knew that a codefendant had been ordered to produce the emails after taking a similar position. The Defendant distinguishes its conduct from that of Foremost arguing that it has many divisions totally unrelated to the property damage issues in this case and it should not have to produce all emails from those divisions. The Court believes that the Defendant has a valid point regarding the production of divisions of the company that do not involve property damage issues. If the Defendant had good faith issues regarding production of emails from divisions of the company totally unrelated to the issues in this case as argued, the production of the emails from the property division would have been produced and a hearing requested to resolve the objections for production of emails from unrelated divisions of the company such as workers compensation, marine and auto. Although the Foremost order was not directed to Chubb, the Court is convinced that lack of compliance with the

direction given by the Court to all parties was for the purpose of obstructing discovery. However, since the Defendant, Chubb, was not a party to that order and since the Court did not expressly extend the order to all other Defendants, the Court will not impose sanctions in this instance.

It is Ordered that Chubb fully and completely respond to Interrogatory No. 21 and Request No's. 23, 27, 50, 67, 98, 102, and 105 contained in Plaintiffs' First Set of Interrogatories and Requests for Production of Documents to Chubb within thirty (30) days;

It is further Ordered that Chubb provide Plaintiffs a list of search terms utilized by it during its search for responsive documents, the extent of the search conducted and a description of the method by which the search was undertaken (i.e. the name of any computer software or program utilized in conducting such search and the identities of any person(s) conducting such search). Chubb is further Ordered to include in its search terms, the terms already used by the thirteen (13) employees previously offered to be searched, as well as, the search terms referenced by Plaintiffs in their Foremost Motion and Reply brief. The search terms which must be included is not a limitation but is a minimum of what is expected.

Further, Chubb is Ordered to immediately instruct all of it's employees in the property division, all employees in any division of the company who have in the past worked in the property division and all employees who have had any input whatsoever into the formulation of policies regarding the adjusting of damage claims of the property division to conduct a search of their respective email systems and produce all other documents that may be responsive to

Plaintiffs' discovery requests. At this time, the Court will exclude emails any employees or officer in all other divisions who do not meet the qualifications set forth above. The Plaintiffs may seek a hearing to determine if relevant information can reasonably be expected to be discovered from employees of other divisions.

The Court further Orders that Chubb shall include all of the following information on all subsequent privilege logs; a Bates range, or other identifying information sufficient to identify the document, the date, author(s) (including his/her title if known), recipient(s) (including his/her title if known), and an adequate description of the allegedly privileged document and the specific privileges under which such documents are being withheld.

To avoid other piecemeal litigation on this issue, the Court Orders that all Defendants in this litigation comply with discovery requests for emails pursuant to the findings set forth above within thirty (30) days of this order.

Production of Knowledgeable Witnesses for Depositions

The Court finds that the Defendant, Chubb, has not provided knowledgeable witnesses for depositions in the past, The Court believes this conduct is a continuing effort to thwart meaningful discovery in this case. Henceforth, the Defendant shall produce witnesses who are knowledgeable of the issues upon which they are to be deposed. This Defendant and all other Defendants are put on notice that such a course of conduct will result in sanctions being imposed by the Court.

The Plaintiffs also allege that documents are withheld until the last minute prior to depositions of defense witnesses. The Court does not make any finding on this issue but will require all documents to be used in the deposition be submitted to the Plaintiffs at least ten (10) days prior to the deposition. If such documents are not provided in a timely manner or knowledgeable witnesses are not produced, the deposition may be suspended by the deposing party with the other party or parties to pay all costs associated with the preparation and attendance at the deposition of the deposing parties counsel. The deposition shall be rescheduled within ten days of the date of suspension at a place and time of deposing parties convenience.

Defendant's Motion for Sanctions Pursuant to Rule 37

The Court does not believe that Rule 37 was intended to allow sanctions for failure to meet and confer although the trial court has the discretion to impose sanctions for failure to abide by the specific rules of discovery implemented in this case. On that basis, the Defendant's Motion for Sanctions is denied.

The Court agrees with Defendant that it may impose sanctions based upon the order which it issued regarding the requirement that the parties meet and confer. However, the Court will not impose sanctions in this instance because there are indications that even though there was no formal meeting between the parties, the issue was discussed, at least to some degree, in person and through correspondence.

It is the Court's belief that a meet and confer on the various issues which may arise is necessary for

the efficient administration of this lawsuit. The Court believes that a meet and confer is necessary even though the chances of resolving the issue may appear remote without court intervention. The Court does not believe that correspondence between the parties is sufficient to satisfy the requirements even when the parties positions appear to be intractable. The Court is satisfied if the meet and confer is accomplished by a conference call or by a formal meeting between the parties. Henceforth, neither correspondence nor informal conversations will suffice to comply with the Court's order to meet and confer. However, the Court expects that the meet and confer will be expedited and not used to delay the resolution of the issue. Further, the Court advises the parties that it will not consider any future motion until the parties have met and conferred prior to the filing of the motion or made a good faith effort to meet and confer with the other party.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the Motion for Sanctions filed by Plaintiffs' is denied; that the Motion for Sanctions filed by the Defendant, Chubb, is denied; Plaintiffs shall submit key words for the Defendant to use in the search of emails within 48 hours of this order being entered; the parties will comply with the above provisions relating to production of emails and other electronically stored information, production of knowledgeable witnesses and the meet and confer guidelines and comply with all other findings set forth above.

Dated this 21st day of December, 2009.

KIRK JOHNSON
KIRK JOHNSON
Circuit Judge

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-1450

IN THE

Supreme Court of the United States

THE STANDARD FIRE INSURANCE COMPANY,
Petitioner,

v.

GREG KNOWLES, Individually and as Class Representative on Behalf of all Similarly Situated Persons Within the State of Arkansas,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, AND INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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October 29, 2012

Library of Congress
Law Library

QUESTION PRESENTED

Last Term, this Court held that in a putative class action "the mere proposal of a class . . . could not bind persons who were not parties." *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2382 (2011). In light of that holding, the question presented is:

When a named plaintiff attempts to defeat a defendant's right of removal under the Class Action Fairness Act of 2005 by filing with a class action complaint a "stipulation" that attempts to limit the damages he "seeks" for the absent putative class members to less than the $5 million threshold for federal jurisdiction, and the defendant establishes that the actual amount in controversy, absent the "stipulation," exceeds $5 million, is the "stipulation" binding on absent class members so as to destroy federal jurisdiction?

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INTERESTS OF *AMICI CURIAE*[1]

The Washington Legal Foundation (WLF) is a public-interest, law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited, accountable government. To that end, WLF regularly appears in cases such as this where (WLF believes) federal courts have unduly restricted the right of a class action defendant to remove a state court action to federal court under the Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, §4, 119 Stat. 4, 9-12. *See, e.g., West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 761 (2011); *Cappuccitti v. DirecTV, Inc.*, 611 F.3d 1252 (11th Cir. 2010), *vacated on reh'g*, 623 F.3d 118 (2010).

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared in this Court on a number of occasions.

The International Association of Defense Counsel (IADC) is an association of corporate and

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties to this dispute have consented to the filing of this brief, and standing letters of consent have been lodged with the Clerk of Court.

insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. Dedicated to the just and efficient administration of civil justice, the IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable costs. In particular, the IADC has a strong interest in the fair and efficient administration of class actions, which are increasingly global in reach.

Amici are deeply concerned by the district court's willingness to allow a single named plaintiff to defeat CAFA removal of a putative class action merely by stipulating to damages below the jurisdictional threshold. Such an approach to federal jurisdiction, and the Eighth Circuit's recent endorsement of it in a similar case, threaten to eviscerate the important protections CAFA affords to class action defendants and absent class members. By yielding to a single named plaintiff's unilateral damages stipulation, the decision below severely undermines the rights of absent class members, whose right to a full recovery is said to be limited by a stipulation they neither knew about nor consented to. Such an approach also disregards congressional intent, by denying a class-action defendant of its statutorily protected right to defend the action in federal court. The rule adopted below thus thwarts the very purpose of removal under CAFA, which was to greatly expand the federal courts' jurisdiction over class actions to further protect class action defendants and absent class members.

STATEMENT OF THE CASE

Respondent brought a putative class action in Arkansas state court alleging that Petitioner breached a homeowner insurance contract by underpaying certain repair claims for hail damage to Respondent's home. Pet. App. 3. Respondent seeks to represent a class comprising all similarly situated Arkansan policy holders who received payments from Petitioner for physical loss or damage to their dwelling between January 1, 2009 and December 31, 2010. *Id.* at 38-39.

Respondent's complaint includes a sworn affidavit signed by Respondent, stating:

> I do not now, and will not at any time during this case, whether it be removed remanded, or otherwise . . . seek damages for the class as alleged in the complaint to which this stipulation is attached in excess of $5,000,000 in the aggregate (inclusive of costs and attorney's fees).
>
> I understand that this stipulation is binding, and it is my intent to be bound by it.

Id. at 75. Based on this stipulation, Respondent's complaint alleges that "Plaintiff *and class* stipulate they will seek to recover total aggregate damages of less than five million dollars ($5,000,000)." *Id.* at 60 (emphasis added). Respondent further alleges that because the above stipulation is "binding" for purposes of establishing the amount in controversy,

"neither diversity nor Class Action Fairness Act ('CAFA') jurisdiction" is available in this case. *Id.*

Pursuant to CAFA, Petitioner timely removed this action to the U.S. District Court for the Western District of Arkansas. *Id.* at 36-37. Conceding that Petitioner had initially met its burden of establishing, by a preponderance of the evidence, the $5 million jurisdictional threshold, the district court nonetheless concluded that Respondent's stipulation established to a "legal certainty" that the requisite amount in controversy had not been satisfied. *Id.* at 8-10. In doing so, the district court relied almost exclusively on dicta from *Bell v. Hershey Co.*, a case in which the Eighth Circuit remarked that a plaintiff who unsuccessfully attempted to avoid removal "*could have* included a binding stipulation with his petition stating that he would not seek damages greater than the jurisdictional minimum upon remand." 557 F.3d 953, 956 (8th Cir. 2009) (emphasis added).

Pursuant to § 1453(c)(1) of CAFA, Petitioner sought leave from the Eighth Circuit to appeal the district court's remand order. Pet. App. 1. When the appeals court denied review without explanation, Petitioner sought rehearing *en banc*. While the petition for rehearing *en banc* was pending, the Eighth Circuit issued its opinion in *Rolwing v. Nestle Holdings, Inc.*, 666 F.3d 1069 (8th Cir. 2012), affirming a remand order based solely on the named plaintiff's unilateral stipulation promising to seek damages below CAFA's $5 million jurisdictional threshold. After releasing its opinion in *Rolwing*, the appeals court denied rehearing *en banc* in this case without comment.

SUMMARY OF ARGUMENT

Seven years ago, Congress took an important step toward the expansion of federal jurisdiction over large, unwieldy class actions with the enactment of the Class Action Fairness Act (CAFA). The primary goal of CAFA was to expand a defendant's ability to remove to federal court a class action that did not satisfy the traditional requirements for diversity jurisdiction. As a result, Congress intended district courts, in evaluating removal, to read CAFA's provisions "broadly" in favor of the federal forum.

Notwithstanding Congress's desire to expand the ability of class-action defendants to remove such suits to federal court, the district court in this case held, and the appeals court has agreed, that a named plaintiff in a class action defeats removal under CAFA merely by stipulating to damages below the jurisdictional threshold—even though that plaintiff is not yet authorized to represent absent class members, much less limit their right to a full monetary recovery.

But this Court has squarely held that putative class members cannot be bound by named plaintiffs (or even by district court judges) *before* certification of the class. The decision below, if left undisturbed, does violence to that rule by allowing a single named plaintiff's amount-in-controversy stipulation to bind absent class members for the sole purpose of defeating removal in a putative class action. Such an approach to removal jurisdiction in class actions not only undermines CAFA's primary goal of federal jurisdiction, it severely undermines the rights of absent class members whose rights to recovery are said to be curtailed by the stipulation.

The district court's approach also undermines the rights of class action defendants, who have a strong interest in ensuring that the entire plaintiff class is bound by any judgment ultimately rendered in class-action litigation. By encouraging putative class representatives to waive the rights of class members to a full recovery, the decision below creates an unacceptable risk that dissatisfied absent class members (and their attorneys) will one day collaterally attack any judgment or settlement reached in the case. That, in turn, will discourage settlements by defendants who are unwilling to commit significant sums to resolve the dispute when a strong likelihood exists that absent class members can avoid the *res judicata* bar of the initial lawsuit.

Finally, the jurisdictional reach of the federal courts is strictly governed by the Constitution and the Congress, not by the stipulated consent of a named plaintiff in a putative class action. By yielding to a single named plaintiff's unilateral damages stipulation, the district court disregarded congressional intent by denying a class-action defendant of its statutorily protected right to defend the action in federal court. That approach thwarts the very purpose of removal under CAFA, which sought to greatly expand the federal courts' jurisdiction over class actions.

This Court "should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction." *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 186

(1907). So long as CAFA jurisdiction exists, the need to safeguard it may well be the greatest in those cases where, as here, the putative class representative tries hardest to defeat it.

ARGUMENT

I. THE DECISION BELOW IGNORES THIS COURT'S CLEAR PRECEDENT ON THE RIGHTS OF ABSENT CLASS MEMBERS AND DEFENDANTS

A. A Unilateral Stipulation Signed By The Named Plaintiff Cannot Bind Absent Class Members

It is axiomatic that, for purposes of determining federal jurisdiction, the amount in controversy must be measured at the time of removal. *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 289-90 (1939) ("Events occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction."). And while it may be true that "the plaintiff is the master of his own claim," *id.* at 294, a named plaintiff in a putative class action is neither lord nor master over the claims of absent class members at the time of removal. Until the *putative* class representative becomes the *actual* class representative, he is without authority to bind absent class members—much less to limit their right of recovery.

This Court has consistently rejected "the novel and surely erroneous argument that a non-named class member is a party to the class-action litigation

before the class is certified." *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2379 (2011) (quoting *Devlin v. Scardelletti*, 536 U.S. 1, 16 n.1 (2005)). Accordingly, the mere filing of a class action complaint, absent certification, can never bind persons who are not yet parties. *See id.* at 2381 n.11 (recognizing that "neither a proposed class action nor a rejected class action may bind nonparties."). Because they are non-parties, absent class members cannot possibly be bound, consistent with due process, by a unilateral stipulation signed by a putative class representative or his attorney. Indeed, "[t]he great weight of scholarly authority—from the Restatement of Judgments to the American Law Institute to Wright and Miller—agrees that an uncertified class action cannot bind proposed class members." *Id.* at 2381 n.11.

Even after a class has been certified, this Court has made clear that the Constitution permits absent class members to be bound by a judgment only if important principles governing non-party preclusion are adhered to. In *Phillips Petroleum Co. v. Shutts*, this Court recognized strict due process limitations on a court's ability to bind nonparties to a class action for money damages. 472 U.S. 797, 811-12 (1985). These protections include the right to notice, an opportunity to be heard, and the right to opt out. *Id.* at 812. Of course, *none* of these safeguards is available for class members at the time a putative class action is removed, and none was provided to the absent class members in this case. Without these safeguards in place, the named plaintiff has no authority to bind absent class members in this or any other matter.

Moreover, a named plaintiff has a strict fiduciary duty to represent and protect the interests of all absent class members. *See, e.g., Hansberry v. Lee*, 311 U.S. 32, 45 (1940) (holding that class representatives "whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, do[] not afford that protection to absent parties which due process requires"). For that reason, a class representative must "possess undivided loyalties to class members." *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 338 (4th Cir. 1998). Here, the named plaintiff's attempt to bind the entire class to less than a full recovery simply cannot be reconciled with the solemn fiduciary duty a class representative owes to seek the maximum recovery on behalf of the class. *See, e.g., Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 724 (5th Cir. 2002) ("It is improbable that [the named plaintiff] can ethically unilaterally waive the rights of the putative class members to attorney's fees without their authorization.").

Similarly, putative class counsel is restrained by legal and ethical obligations that do not permit him to go beyond the limitations of the lawyer-client relationship in making representations to the district court. Consistent with this Court's jurisprudence and the American Bar Association's (ABA) Model Rules of Professional Conduct, the ABA has issued a formal opinion that no lawyer-client relationship exists between class counsel and putative class members until the class is certified and the opt-out period has expired. *See* Formal Opinion 07-445 of the ABA Standing Committee on Ethics and Professional Responsibility, "Contact by

Counsel with Putative Members of Class Prior to Class Certification" (April 11, 2007) ("A lawyer-client relationship with a potential member of the class does not begin until the class has been certified and the time for opting out by a potential member of the class has expired."). The rule that no attorney-client relationship exists between members of a potential class and an attorney representing the named plaintiff(s) is "the view embraced by most courts, the Restatement, and the leading class action treatise." *See* Debra Lynn Bassett, *Pre-Certification Communication Ethics in Class Actions*, 36 Ga. L. Rev. 353, 355-56 (2002). Accordingly, Respondent's curious allegation in the class action complaint (drafted by putative class counsel) that "Plaintiff *and class* stipulate they will seek to recover total aggregate damages of less than five million dollars ($5,000,000)," Pet. App. 60 (emphasis added), raises far more questions than it answers. In short, because neither the named plaintiff nor his attorney has ever been authorized to represent the rest of the class, no such stipulation on behalf of the class is permissible.

Indeed, one of the primary responsibilities of the class representative is to provide a healthy degree of independence from class counsel, so that when the interests of the class come into conflict with those of class counsel, the interests of the class will be preserved. *See, e.g., CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 724 (7th Cir. 2011) (holding that a class representative must be "able to ensure that class counsel act as faithful agents of the class"); *Kirkpatrick v. JC Bradford & Co.*, 827 F.2d 718, 727 (11th Cir. 1987) (finding putative class representatives inadequate because

"they would be unable or unwilling to protect the interests of the class against the possibly competing interests of the attorneys").

In *Shutts*, this Court made clear that a putative class representative owes a fiduciary duty to absent class members "at all times" during the litigation. 472 U.S. at 812 ("[T]he Due Process Clause of course requires that the named plaintiff *at all times* adequately represent the interests of the absent class members.") (emphasis added). As the Court's phrase "at all times" indicates, the named plaintiff owes a duty to absent class members even at the removal stage. As such, a putative representative "can't throw away what could be a major component of the class's recovery" by stipulating away otherwise available money damages. *Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830 (7th Cir. 2011).

More fundamentally, the authority of a stipulation arises solely from the consent of those who agree to be bound by it. One consents to a stipulation in a putative class action the same way one consents to any other binding contract—by signing it. An absent class member cannot be bound to a unilateral stipulation merely because he may, *at some time in the future*, be sent a letter informing him that he is a member of an as-yet-uncertified class. Nor can absent class members be bound by a stipulation because other persons—even if they are ultimately members of the same class—have signed it. Legal consent is an individualized matter, and a putative class action complaint cannot possibly transform a stipulation signed by one party into a stipulation signed by absent, unrepresented persons.

Simply put, Respondent's allegation that "Plaintiff *and class* stipulate they will seek to recover total aggregate damages of less than five million dollars ($5,000,000)," Pet. App. at 60 (emphasis added), is without legal or factual foundation. As such, it is a legal nullity that cannot conclusively establish the amount in controversy in this or any other case. *See, e.g., Back Doctors Ltd.*, 637 F.3d at 831 ("What Back Doctors is willing to accept thus does not bind the class and therefore does not ensure that the stakes fall under $5 million."); *Pfizer, Inc. v. Lott*, 417 F.3d 725, 725-26 (7th Cir. 2005) ("The named plaintiffs stipulated that they would not seek or even accept damages in excess of $75,000 [but that] stipulation would not bind the other members of the class."). For that reason alone, the decision below must be reversed.

B. Because Absent Class Members Cannot Possibly Be Bound By A Unilateral Stipulation At The Removal Stage, Defendants Will Be Unfairly Prejudiced

As demonstrated above, a named plaintiff's unilateral damages stipulation is nonbinding on the putative class and thus unable to limit the available recovery of absent class members. At the same time, *Shutts* makes clear that a class action defendant has a strong interest in ensuring that the entire plaintiff class is bound by any judgment ultimately rendered in the case. *Shutts*, 472 U.S. at 805 ("Whether it wins or loses on the merits, [a class action defendant] has a distinct and personal interest in seeing the entire plaintiff class bound by *res judicata*

just as [the defendant] is bound."). That interest is completely upended by the Eighth Circuit's novel approach to CAFA removal, which threatens to increase the uncertainty of class action judgments.

Because only a subsequent court can decide whether the claimants before it were adequately represented and thus bound by a prior adjudication, allowing a named plaintiff to unilaterally limit the recovery of absent class members necessarily invites subsequent challenges by absent class members who do not wish to be bound and virtually guarantees future collateral attacks and satellite litigation on any judgment that may be reached in state court. Class action judgments in such cases are susceptible to being reopened years down the road by absent class members seeking to challenge the validity of a damages stipulation that limited their recovery without their knowledge, much less their consent.

Under the Eighth Circuit's approach to CAFA removal, then, class action defendants can no longer rest assured that protracted litigation, once settled or tried to verdict, has been brought to an end. Indeed, once a class is certified, defendants may well find themselves trapped in an untenable "heads-I-win-tails-you-lose" scenario. If the defendant loses at trial, he will be expected to pay damages to all class members. But any victory at trial for the defendant (or favorable class-wide settlement) may well turn out to be pyrrhic, as absent class members are likely to file a new suit raising identical claims, insisting that they are not bound by the original judgment because they never consented to limit their recovery to an amount below the jurisdictional threshold for removal.

The holding below thus threatens to transform the class action from a device designed to facilitate the efficient adjudication of similar claims into a one-sided process that places class action defendants at a severe disadvantage. Defendants face the prospect of paying large settlements or damage awards without any real assurance that those payments will bring about an end to litigation. At the very least, the rule adopted below is likely to discourage settlements by defendants who are unwilling to commit significant sums to a settlement when the strong likelihood exists that absent class members can avoid the *res judicata* bar by collaterally attacking the damages stipulation.

The goals of fairness, predictability, and consistency were all injured in this case. Only this Court can now vouchsafe the settled expectations that traditionally flow from binding resolution of class-action litigation. Otherwise, if the Eighth Circuit's approach to federal jurisdiction prevails, defendants will have far less reason to commit significant sums to the settlement of such suits if they can have no assurance that absent class members will be barred from renewing settled claims. Such a decrease in settlement rates will only further clog our nation's crowded court dockets and delay the receipt of compensation by injured plaintiffs with valid claims.

II. THE DECISION BELOW THREATENS TO UNDERMINE CONGRESS'S BROAD GRANT OF FEDERAL JURISDICTION UNDER CAFA

A. CAFA Was Designed To Broadly Confer Federal Jurisdiction Over Class Actions To Further Protect Both Defendants And Absent Class Members

The express purpose of CAFA was to greatly expand the federal courts' jurisdiction over large, nationally important class actions. *See* Judiciary Committee Report on Class Action Fairness Act, S. Rep. 109-14 at 43 (2005). In so doing, Congress expressed grave concerns about the proliferation of state-court class actions that employed procedures unfair to non-resident defendants. It also sought to protect the rights of absent class members in light of the harm that results from those cases in which "counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value." Pub. L. No. 109-2, §§ 2(a)(2)(A), 2(a)(3)(A), 2(a)(4); *see also* S. Rep. No. 109-14, at 15 (lamenting the proliferation of "class action settlements approved by state courts in which most—if not all—of the monetary benefits went to class counsel" instead of class members themselves). In enacting CAFA, Congress also found that "[a]buses in class actions undermine[d] the National judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution. . . ." Pub. L. No. 109-2, § 2(a)(4).

CAFA lowers the barriers to federal court by adjusting the amount in controversy requirement, dispensing with the rule that all plaintiffs must be diverse from all defendants, and eliminating the absolute bar on removal by home-state defendants in diversity actions. CAFA permits removal of a class action to federal court in those cases where "the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs." 28 U.S.C. § 1332(d)(2). In determining the amount in controversy, "the claims of the individual class members shall be aggregated to determine whether the amount in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs." 28 U.S.C. § 1332(d)(6). The statute thus sets forth a specific mechanism for calculating the "sum or value" of the "matter in controversy": "the *claims* of the individual class members *shall be aggregated* to determine whether" the total exceeds the jurisdictional threshold. *Id.* (emphasis added).

In addition, CAFA also liberalizes traditional diversity rules by permitting federal jurisdiction so long as minimal diversity exists among the parties. *See* 28 U.S.C. § 1332(d)(2)(A). Finally, CAFA replaces the absolute bar on removal by home-state defendants with a sliding scale founded on judicial discretion. *See* 28 U.S.C. § 1332(d)(3)-(4). In short, CAFA "enabled defendants to remove to federal court any sizable class action involving minimal diversity of citizenship." *Bayer Corp.*, 131 S. Ct. at 2382 (2011).

CAFA's provisions are to be read broadly, with "a strong preference that interstate class actions should be heard in a federal court if properly

removed by any defendant." S. Rep. No. 109-14 at 43; *see id.* at 42 ("If a purported class action is removed pursuant to these jurisdictional provisions, the named plaintiff(s) should bear the burden of demonstrating that the removal was improvident (i.e., that the applicable jurisdictional requirements are not satisfied)."); 151 Cong. Rec. H723-01, at H727 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner) ("If a Federal court is uncertain . . . the court should err in favor of exercising jurisdiction over the case").

Suffice it to say, Congress "did not extend such protection with one hand, and with the other give plaintiffs a bag of tricks to overcome it." *McKinney v. Bd. of Trustees of Mayland Cmty. Coll.*, 955 F.2d 924, 928 (4th Cir. 1992). If lead plaintiffs and their counsel are permitted to unilaterally stipulate around the contours of CAFA at will, thereby evading congressionally-mandated protections whenever they wish, the purpose of CAFA will be eviscerated. Indeed, the very formula imposed by CAFA for calculating the amount in controversy (i.e., aggregating the claims of the individual class member) will be jettisoned at the whim of a single named plaintiff and his counsel.

Permitting use of stipulations to defeat removal of class actions to federal court will also defeat one of CAFA's principal goals: preventing plaintiff's attorneys from filing putative class actions in multiple states in the hopes of finding at least one judge willing to certify a class. *See* S. Rep. No. 109-14, at 23 (describing tactics used by class action plaintiffs' counsel). Unlike the federal system, state courts do not have mechanisms to consolidate

overlapping cases, which results in an enormous waste of judicial resources—something that CAFA was also enacted to avoid. *See* S. Rep. No. 109-14, at 23 ("multiple judges of different courts must spend considerable time adjudicating precisely the same claims asserted on behalf of precisely the same people."); *see also id.* at 52 (discussing the "unfairness" when "[d]efendants are forced to defend the same case in many different courts, [a]nd class members are harmed because the various class counsel compete with each other to achieve the best settlement for the lawyers"). This Court should ensure that the availability of a federal forum and the accompanying protections conferred by CAFA are not so easily circumvented.

B. If Upheld, The Decision Below Would Allow Named Plaintiffs And Their Counsel To Effectively Eliminate The Protections That A Federal Forum Affords Absent Class Members, In Contravention Of CAFA's Purpose

As demonstrated above, Congress relaxed the criteria for removing a class action to federal court based on extensive findings that state courts routinely certify classes without affording defendants the procedural safeguards necessary to protect the rights of defendants and absent class members alike. When a putative class representative is willing to limit the class's recovery in exchange for the opportunity to remain in state court, it logically follows that he fully expects to benefit from a state-court bias. A court that facilitates this trade-off, by allowing a stipulation of

damages to defeat federal jurisdiction, undermines Congress's desire to protect class-action defendants from state-court prejudices.

Among the benefits of federal jurisdiction that Congress intended to promote with CAFA are the rigorous protections Rule 23 provides to absent class members. *See* CAFA, §§ 2(a)(2)(A), 2(a)(3), 2(a)(4), 2(b)(1)-(2); S. Rep. No. 109-14, at 13-14 (citing state courts' failure to follow Rule 23's strict requirements or state's parallel governing rule); *see also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1473 (2010) ("Congress sought to check what it considered to be the overreadiness of some state courts to certify class actions"). One of Rule 23's key functions is to protect the due process rights of absent class members. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1751 (2011) ("For a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class"); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 621 (1997) (stating that the Rule 23 was designed "for the protection of absent class members [and] serve[s] to inhibit appraisals of the chancellor's foot kind—class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness").

Among other things, Rule 23(e) provides for court review of any proposed settlement of a class action. If allowed to use unilateral damages stipulations to avoid federal jurisdiction, however, putative class representatives and their counsel will

be able to deprive absent class members of both federal court protections and the potential for a greater monetary recovery—all without requiring court review or oversight of the fairness of the stipulated amount. *See, e.g., Rolwing*, 666 F.3d at 1070–71 (acknowledging that aggregated damages from the complaint would have totaled $12 million, but affirming remand based solely on plaintiff's stipulation to seek less than $5 million for the sole purpose of evading CAFA jurisdiction). This result runs contrary to Congress's express purpose in enacting CAFA.

CONCLUSION

For the foregoing reasons, *amici curiae* Washington Legal Foundation, Allied Educational Foundation, and International Association of Defense Counsel respectfully request that the Court reverse the remand order issued below.

Respectfully submitted,

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October 29, 2012